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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1972

No. .....

DALE C. RICHARDSON,

Petitioner,

vs.

COMMUNICATIONS WORKERS OF AMERICA, AFL-CIO, and LOCAL 7495, COMMUNICATIONS WORKERS OF AMERICA, AFL-CIO,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Eighth Circuit entered on November 16, 1972, Petition for Rehearing En Banc denied December 8, 1972, ninety-day stay of mandate issued December 14, 1972.

CITATIONS TO OPINIONS BELOW

The November 14, 1972 opinion of the United States Court of Appeals for the Eighth Circuit, 469 F.2d 333, is printed in Appendix A. The February 29, 1972 unreported "Memorandum and Order" of the United States District Court for the District of Nebraska is printed in Appendix B. The June 4, 1971 opinion of the Court of Appeals, reported at 443 F.2d 974, is printed in Appendix C. The April 25, 1967 opinion of the District Court, reported at 267 F. Supp. 403, is not relevant to the issues here and has thus not been printed. The unreported December 4, 1972 order and judgment of the District Court is printed in Appendix D.

JURISDICTION

The judgment of the Court of Appeals, Appendix A, was entered on November 16, 1972. On December 14, 1972, subsequent to the December 8, 1972 denial of a petition for rehearing, the Court of Appeals stayed its mandate for 90 days, pending the filing of and determination on a petition to this Court for a writ of certiorari.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

I. **Can an order for a third jury trial which will occur seven years after suit, without fault or delay by the holder of two earlier verdicts, constitute a denial of due process of law and a denial of trial by jury?**

II. **Is a Court of Appeals vested with jurisdiction in an appeal from a grant of a new trial where the District Court lacked jurisdiction to make such grant or where the grant constituted an abuse of discretion?**

III. **Is a written determination of "no just reason for delay" a jurisdictional prerequisite to appealability of a judgment entered on only one of two claims in an action?**

IV. **May a Court of Appeals deny oral argument under its own rule applicable neither to all cases nor to specified classes of cases?**

CONSTITUTIONAL PROVISIONS, STATUTES, AND FEDERAL RULES

The constitutional provisions involved in the petition are the Seventh Amendment, and the due process clause of the Fifth Amendment, to the United States Constitution. The action was brought under the provisions of 29 U.S.C. § 185(a). The statute setting forth the public policy underlying the Labor-Management Relations Act is 29 U.S.C. § 141(b). The statute which determines appealability of an order is 28 U.S.C. § 1291. The rule governing order for new trial is Rule 59, Federal Rules of Civil Procedure. The rule governing finality of judgments is Rule 54, Fed. R. Civ. P. The rules governing entry of judgments are Rules 49(b) and 58, Fed. R. Civ. P. The policy of just, speedy, and inexpensive trials is set forth in Rule 1, Fed. R. Civ. P. The rules pertaining to oral argument are Rule 34, Federal Rules of

Appellate Procedure, and Eighth Circuit Rule 6(2). The rule governing suspension of appellate rules is Rule 2, Fed. R. App. P.

STATEMENT

As permitted by Section 14(b), Taft-Hartley Act, the State of Nebraska has a Right to Work law, Nebraska Constitution, Article XV, Sections 13-15.

This lawsuit arose from the harassment, and the unlawful discharge from employment, of petitioner, as a consequence of withdrawal of his membership from the defendant union. The facts shown in evidence at both trials are well summarized in footnote 12 of the Court of Appeals opinion printed in Appendix C (Appendix pp. 23, 24, n. 12). Since shortly after discharge, September 1, 1966, petitioner has been continuously employed as a police officer.

The action against the employer and the union for damages for lost compensation and for mental anguish was filed in the District Court on December 21, 1966. There have been 184 filings in the District Court alone. It was first tried to a jury four years ago, from February 17 - 26, 1969. The trial judge refused to permit the jury to consider damages for any compensation except that lost within the first seven months after discharge, within the unexpired term of the collective bargaining agreement. The trial judge also refused to permit the jury to consider damages for mental distress.

Four and one-half months after the jury returned a joint and several $20,000 verdict against the employer and the union, the District Court, on July 10, 1969, ordered a new trial. Nine months later on April 15, 1970, the court reduced the

award to $1,500 and entered judgment.

On petitioner's appeal, the Court of Appeals (June 4, 1971 opinion, Appendix C) reversed the District Court and remanded the matter, with directions, for a new trial. Petitioner, by permission of the Court of Appeals, amended his complaint to plead two causes of action: (1) against the union only, on the issues of both liability and damages for mental distress; (2) against the union and the employer for lost compensation. Liability of the employer and the union for lost compensation having been established on the first trial, the second trial thereon was ordered by the Court of Appeals to be limited to amount of and allocation of damages.

The second trial occurred 1-1/2 years ago, from September 7 - 16, 1971, before the same judge who presided at the first trial. The $92,000 award for lost compensation was allocated 70% - 30% against the union and the employer respectively. A $250,000 award for mental distress was returned against the union only.

Prior to any determination of its post-trial motions, the employer was dismissed from the suit upon a compromise settlement of its liability.

Twenty-three days after the verdict, the union filed a motion for a remittitur, printed in Appendix E. The motion sought judgment n.o.v. only in the event of petitioner's refusal of any ordered remittitur, and sought a new trial only as an alternative to judgment n.o.v.

Upon receipt of the verdict, the trial judge immediately stated to the jury his doubts that he could "let part of it [the verdict] stand." On February 29, 1972, over five months after the verdict, the District Court

ordered (Appendix B) a new trial on the cause of action for mental distress, on the ground that the verdict was the result of "passion, prejudice, mistake, or some other improper reason." The District Court at the same time ordered the entry of judgment against the union for $64,400 for lost compensation, and judgment was so entered. The order for new trial was accomplished without the entry of any judgment on the cause of action for mental distress.

The union appealed from the judgment entered for damages for lost compensation. Petitioner appealed from the order for a new trial on the cause of action for damages for mental anguish.

The Court of Appeals scheduled the filing of briefs. The parties filed a 46-page appendix. Petitioner filed two briefs totaling 61 pages at a printing cost of over $900. The union filed two briefs totaling 58 pages. Neither party filed a reply brief.

About five months after the appeals were taken, and after expiration of the time to file briefs, the Court of Appeals scheduled a hearing for November 14, 1972. The order for hearing, alloting time for oral argument, is printed in Appendix F.

Five days before the scheduled hearing, the Court of Appeals advised the parties by letter that the case had been classified as one requiring no argument, and that appearance of counsel in St. Louis on November 14 was unnecessary.

On telegraphic notice to opposing counsel, petitioner's attorney appeared on November 14, 1972 and filed a written motion, as authorized by Eighth Circuit Rule 6(3), seeking permission to make oral argument on grounds which included the District Court's lack of jurisdiction to order a new trial.

The Court of Appeals refused to hear the argument and

dismissed for lack of jurisdiction on the appeals of both petitioner and the union, on the ground that neither appeal was taken from a final order or judgment.

The judgment entered against the union was held not final because the District Court did not "certify the order as appealable under Rule 54(b) of the Federal Rules of Civil Procedure" (Appendix p. 2). The order for a new trial was held not final because such order "may be challenged on the abuse of discretion in an appeal only from the final judgment" (Appendix p. 2). Petitioner had sought disposition of the union appeal on its merits and had raised no jurisdictional issue.

Four days before denial of a petition for rehearing en banc by the Court of Appeals, the District Court made a second order for entry of judgment (Appendix D) against the union for lost compensation, which order contained an express determination of "no just cause for delay" (Appendix pp. 28, 29). Judgment was so entered (Appendix D) on the following day. Before the petition for rehearing was denied, the Clerk of the Court of Appeals had been advised by telegram and telephone of the second entry of judgment.

The Clerk refused to file petitioner's motion for an order for a supplemental record showing the re-entered judgment and the order therefor, because such motion was received after denial of the petition for rehearing.

REASONS TO GRANT THE WRIT

I

The Order For A Third Jury Trial Which Will Occur Seven Years After Suit, Without Fault Or Delay By

The Holder Of Two Earlier Verdicts, Can And Does Constitute A Denial Of Due Process Of Law And A Denial Of Trial By Jury.

Rule 1, Fed. R. Civ. P., requires a construction of the rules which will secure a just, speedy, and inexpensive determination of every action. Rule 2, Fed. R. App. P., demonstrates a dedication to expedited decisions by its permission to suspend any rule to achieve such end. Included in 29 U.S.C. § 141(b) is a statement that the purpose and policy of the Labor-Management Relations Act includes protection of the rights of individual employees in their relations with labor organizations. This Court held in *County of Allegheny v. Frank Mashuda Co.*, 360 U.S. 185, 196 (1959), that a lower court's imposition of added delay and expense exacted such a severe penalty from the citizens involved as to deny them "that promptness of decision which in all judicial actions is one of the elements of justice."

The petitioner has so far expended around $6,500 for expenses of suit alone, all of which was contributed by others, and without which contributions the suit could have been neither filed nor maintained. See supplement to Moore's Federal Practice § 110.12, page 151, with respect to power of an appellate court to prevent further useless expenditure.

The facts on which the action is based began over seven years ago, in early February, 1966. The suit has been on file since December 20, 1966. Petitioner has not been dilatory. The repeated trials and the long delay have not stemmed from any error or misconduct of petitioner or his counsel.

Any third trial will likely be conducted by the same

judge who presided over the two preceding trials. As the situation now stands, there is no basis on which petitioner can conclude that an award of damages for mental distress will ever be permitted to stand.

If verdicts for petitioner for damages for mental distress continue to be returned and set aside, petitioner can never reach the Court of Appeals on an appealable order or judgment after even a third or subsequent trial.

The trial judge has never yet entered judgment on the verdict for mental distress, in violation of procedures required by Rule 58, Fed. R. Civ. P. Thus, even if the order for new trial were to be reversed on appeal, another motion for new trial would still be timely, since the period for making the motion (within ten days after judgment) has not yet begun to run on this 18-month-old verdict. Such a procedure even deprives petitioner of interest on his verdict.

In *Freid v. McGrath,* 133 F.2d 350, 356 (D.C. Cir. 1942), in striking down an attempt to extend the time for the court to grant a new trial on its own initiative, it was held:

> "But this constitutes no reason for extending indefinitely the time within which he may act of his own initiative. To permit him to do so would emasculate Rule 59(d) and defeat its salutary purposes."

In *Commissioner of Internal Revenue v. Estate of Bedford,* 325 U.S. 283, 288 (1945), this Court stated:

> "The uncertainties inherent in litigation should not be needlessly prolonged . . . So long a period ought not to be extended by delay in

> entering a judgment . . . Uniformity in the entry of judgment among the eleven circuits forming the single federal judicature ought to be capable of achievement without loss to the geographic flexibility of the system."

The endlessness of the litigation and of the expense is out of step not only with the civil and appellate rules, with the long-established policies of the federal courts and of federal labor law, but as well with the more recent concern over congested courts and conservation of judicial energy.

With respect to petitioner's inability to get a final judgment, some noteworthy allegations are found in a recent law review article (Tobias, *A Plea For the Wrongfully Discharged Employee Abandoned By His Union,* 41 Cincinnati L. Rev. 55, 66-67 [1972]):

> " . . . cases decided subsequent to *Vaca* show a reluctance on the part of the federal courts to implement meaningfully the decision. Highly competent company and union counsel have persuaded the lower courts to place obstacle over obstacle in front of the discharged employee who brings suit.
>
> " . . .
>
> "There are several hundred reported post-*Vaca* cases. Most have resulted in dismissals on the pleadings or summary judgments in favor of defendants. The few cases which have resulted in plaintiff verdicts uniformly have been reversed or remanded on appeal."

On the question of what constitutes deprivation of a

cause of action without due process of law, under the Fourteenth Amendment, this Court held:

> "A vested cause of action is property and is protected from arbitrary interference . . . [the holder of the cause of action] is guaranteed . . . the preservation of his substantial right to redress by some effective procedure."
>
> *Gibbes v. Zimmerman*, 290 U.S. 326, 332 (1933).

The third trial has not been ordered because of any perceived or specified passion, prejudice, or other error by the jury or the parties. The antipathy of the trial judge toward damages for mental distress is demonstrated by refusal at the first trial to allow the jury to consider such damages, and by skepticism in the February 29, 1972 order (Appendix B) that any such damages were proven in the second trial.

To repeatedly deny petitioner his hard-earned jury verdicts on such grounds as here, and to order a third trial so long after the events giving rise to it, with the consequent fading of recollections and dispersal of witnesses, is to deny him both due process of law and trial by jury. It is clear that the trial judge would in both trials have refused any damages for mental distress. However, the issue was one for the jury and not for the court.

II

A Court Of Appeals Is Vested With Jurisdiction In An Appeal From A Grant Of A New Trial Where The District Court Lacked Jurisdiction To Make Such Grant.

A. Lack of Jurisdiction of District Court to Order New Trial.

The order from which certiorari is sought states that "It has long been settled that the granting of a new trial is not an appealable order."

In an appeal from a grant of a new trial by the same district judge as here, the Eighth Circuit reversed the order, holding it appealable where jurisdiction to grant a new trial was challenged. The decision included citations to three earlier Eighth Circuit decisions to the same effect. *Chicago and North Western Railway Company v. Britten*, 301 F.2d 400 (8th Cir. 1962).

Judge Hastie recognized and followed the same principle in *Demeretz v. Daniels Motor Freight, Inc.*, 307 F.2d 469, 471-72 (3d Cir. 1962). Although Professor Moore disagrees with the principle, he recognizes that " . . . an order granting a new trial is appealable when the ground therefor is that the trial court lacked jurisdiction or power so to order." 6A Moore's Federal Practice § 59.15[1], note 36, at 3897 (1972).

1. Necessity for Notice, Hearing, and Specification of Grounds.

The petition for rehearing specifically challenged the jurisdiction of the District Court, because a new trial was ordered without any motion therefor, on the court's own initiative, without the notice, opportunity for hearing, and specification of grounds, which are required under such circumstances by Rule 59(d), Fed. R. Civ. P.

The requirement for "notice and opportunity to be heard" was added to Rule 59(d) by a 1966 amendment and has been interpreted by only *Harkins v. Ford Motor Co.*, 437 F. .d 276 (3d Cir. 1970). It was there held that a new trial granted for reasons not stated in a motion was granted on the court's own initiative. After posing the question whether failure to comply with the notice requirements of Rule 59(d) deprived the District Court of power to grant a new trial, the court avoided answering its own question by reversing the order for new trial on the ground that the reasons advanced for the grant were without merit.

2. **"Passion or Prejudice" As a Specification of Grounds.**

In petitioner's case, the grant of a new trial was based on no specification of error which was narrower than the court's assumption from the size of the $250,000 verdict that it stemmed from passion, prejudice, or some other improper reason. The reasons for the grant of the new trial were thus so vague as not to constitute the specification of grounds required by Rule 59(d).

The various Courts of Appeals are divided in their opinions of whether passion or prejudice may be inferred from the size of the verdict. The split is relevant to this petition in that by one position, a finding of passion or prejudice based only on the size of the verdict is necessarily a sufficient specification of grounds for a new trial, while by the majority position, that urged by petitioner, such a finding is necessarily an insufficient specification therefor, and is thus not in compliance with Rule 59(d).

> "Whether passion or prejudice may be inferred from the size of the verdict alone is questionable."
>
> 6A Moore's Federal Practice § 59.08[6], note 45, page 3830 (2nd Ed. 1972) [the note shows the division of the circuits].

> "Bias and prejudice are not inferable from the mere excessiveness of the verdict but must be shown by other evidence."
>
> 44 Yale Law Journal 318, 321, note 18.

In addition to the cases in Professor Moore's just-cited footnote 45, the split in the circuits is further shown by some more recent cases. Supporting an inference of passion or prejudice from the size of the verdict alone is *Barnes v. Smith*, 305 F.2d 226, 228 (10th Cir. 1962); inferentially opposing this view is Judge Medina's comment in *Dagnello v. Long Island Rail Road Company*, 289 F.2d 797, 802 (2d Cir. 1961):

> "In some cases the very amount of the verdict is said to justify the inference that the verdict was brought about by passion or prejudice, although it seems to us that this is just another way of saying the verdict is too high."

The Eighth Circuit is aligned in support of the position that an inference of passion or prejudice may be drawn from the size of the verdict alone. The holding in *Richardson v. Communications Workers, etc., et al.*, 469 F.2d 333 (8th Cir. 1972), could not otherwise have

been reached. Also, the court appears to support that same position in *Bankers Life & Casualty Company v. Kirtley*, 307 F.2d 418, 426 (8th Cir. 1962). The Eighth Circuit in *Bankers*, page 426, refers approvingly to a disposition of a case by the Iowa Supreme Court because it had been "retried once and litigation should come to an end."

3. Why Specify Grounds for New Trial?

The reasons for requiring specification of grounds are manyfold. Such specification is helpful in appellate review for abuse of discretion. Such an abuse is virtually unreachable when an unsupported and unspecific finding of "passion or prejudice" is permitted to stand. Without a further specification, no guidance is offered toward avoidance of the same result in the third or subsequent trial.

If the order for new trial is truly unappealable, can a fourth trial be ordered because of "passion or prejudice" inferred from the size of a third trial verdict of $200,000? Of $2,000?

4. Infection of Only One Verdict By Passion or Prejudice.

How can a verdict against a defendant on one cause of action be infected by passion or prejudice, while a verdict against the same defendant on another cause of action in the same trial is free from passion or prejudice?

It is a familiar rule from criminal cases that acquittal of a defendant on one count by a jury is some

indication that a conviction on another count was not the result of prejudicial error at the trial, in that the jury was able to differentiate between the two counts. *People v. Silva,* 236 Cal. App. 2d 453, 458 (1965).

The finding that the verdict was excessive because of passion or prejudice was more damaging to petitioner than would have been a simple finding that the verdict was excessive. Without a finding of passion or prejudice, a new trial limited to the issue of the amount of damages could have been ordered. Without a finding of passion or prejudice, a remittitur could have been ordered, thus giving petitioner an opportunity for appeal. However, the finding that the excess stemmed from passion or prejudice, by the weight of authority, effectively precludes as a matter of law any remittitur or any limited new trial. 6A Moore's Federal Practice § 59.08[6], page 3823.

5. New Trial Ordered Without Hearing or Notice As A Denial of Due Process of Law.

"An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all of the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections [quoting from *Milliken v. Meyer,* 311 U.S. 457 (1940)]."

Armstrong v. Manzo, 380 U.S. 545, 550 (1965).

"The right to a hearing embraces . . . a reason-

> able opportunity to know the claims of the opposing party and to meet them."
>
> *Gonzales v. United States,* 348 U.S. 407, 414, n. 5 (1955).

B. Abuse of Discretion by Trial Court.

A Court of Appeals may review the questions of law presented by the decision of the trial court on a motion for new trial. An abuse of discretion by the trial court is an error of law and may be reviewed as such. It is an exception to the rule that the granting or refusal of a new trial is not assignable as error. *Whiteman v. Pitrie,* 220 F.2d 914, 918 (5th Cir. 1955); *Bankers Life and Casualty Company v. Kirtley, supra,* 307 F.2d 418, 423-24 (8th Cir. 1962).

The District Court's only specification why the verdict was excessive was squarely within the doctrine of *Harkins v. Ford Motor Co., supra,* 437 F.2d 276 (3d Cir. 1970), that an order for a new trial must be reversed where made on erroneous grounds. Application of the wrong standard is an error of law and an abuse of discretion in determining whether to grant a new trial. *Williams v. Nichols,* 266 F.2d 389, 392, 393 (4th Cir. 1959).

The District Court found the verdict excessive because petitioner had not been shown by the evidence to be an especially sensitive or susceptible person, nor had he been shown to be especially vulnerable to injuries in the nature of mental distress.

The test applied by the court was erroneous. Mental anguish may be inferred from the circumstances attending the breach of duty and is not required to be shown by

direct proof. 22 Am. Jur. 2d Damages, §§ 299, 310 (note 18).

The circumstances set forth in footnote 12 of the June 4, 1971 opinion of the Court of Appeals (Appendix C) were proven not only at the first trial but at the second trial as well. Additional union misconduct attendant upon its breach of duty toward petitioner was also shown at the second trial. The proof elicited at that second trial overwhelmingly compels a conclusion that petitioner suffered mental distress.

C. Jurisdiction of Petitioner's Appeal on Other Grounds.

If, as discussed *infra*, the Court of Appeals had jurisdiction over the union's appeal from the judgment on the cause of action for lost compensation, it then had jurisdiction of petitioner's appeal in the same case, even if the order appealed from might otherwise be interlocutory and not final. *Green v. Wolf Corporation*, 406 F.2d 291 (2d Cir. 1968), *cert. denied* 395 U.S. 977 (1969).

Holding that inability to act after review creates judicial inefficiency is *Clark v. Kraftco Corporation*, 447 F.2d 933, 935 (2d Cir. 1971). "Danger of denying justice by delay" was stated as a test of finality by *Gillespie v. United States Steel Corp.*, 379 U.S. 148 (1964), and by the following cases thereafter: *Kelley v. Metropolitan County Board, etc.*, 436 F.2d 856, 862 (6th Cir. 1970) (finality of stay granted to await Supreme Court ruling in pending similar action); *Norman v. McKee*, 431 F.2d 769, 774 (9th Cir. 1970) (finality of order denying settlement of class action); and *Firestone Tire and Rubber Co. v. General Tire & Rubber Co.*, 431 F.2d 1199, 1200 (6th Cir. 1970).

III

A Written Determination Of "No Just Reason For Delay" Is Not A Jurisdictional Prerequisite To Appealability Of A Judgment Entered On Only One Of Two Claims In An Action.

The brief November 16 opinion of the Court of Appeals (Appendix A) held *sua sponte* that the judgment entered on the first cause of action was nonappealable on the ground that the "trial court did not certify the order as appealable under Rule 54(b) . . . . "

The applicable language of Rule 54(b) provides that " . . . the court may direct the entry of a final judgment as to one or more but fewer than all of the claims or parties only upon an express determination that there is no just reason for delay and upon an express direction for the entry of judgment."

The closing phrase of the District Court's "Memorandum and Order," with respect to the first cause of action, directed that "a judgment will be entered." The judgment was promptly entered.

When the court has directed in writing that judgment be entered, over five months after the trial, after overruling a motion for a remittitur, or judgment n.o.v. or a new trial upon refusal to remit, and when that judgment was actually entered, is not the court's position crystal clear? Could it be found by any stretch of the imagination that the trial judge felt that there was any just reason for further delay?

Is there some magic in a specific finding of "no just reason for delay," when that finding is necessarily implicit in the order for and the actual entry of judgment?

Neither the union nor petitioner raised any issue of appealability of that judgment. The purpose of Rule 54(b) is to avoid the waste of judicial energy involved in piecemeal appeals. However, the reason underlying Rule 54(b) called for the appeal on that first cause of action to be decided on its merits. The issues on that appeal were fully briefed and presented to the Court of Appeals except for oral argument. To refuse to decide it on its merits is simply a further waste of judicial energy at all levels, and of the funds and energies of the parties and their counsel.

The District Court has already entered an order containing the words "no just cause for delay" (Appendix p. 28), and the union has again appealed, all subsequent to the November 16, 1972 order of the Court of Appeals. Since it would be illogical to permit retrial of the second cause of action during the pendency of an appeal on the first cause of action, the third trial of this endless case will then necessarily be delayed while the new appeal is pending and during the pendency of any petition for writ of certiorari thereafter. Can the Court of Appeals wait out the appellate cycle before holding the new appeal void because taken from a judgment entered before issuance of the mandate of the Court of Appeals?

IV

A Court Of Appeals May Not Deny Oral Argument Under Its Own Rule Applicable Neither To All Cases Nor To Specified Classes Of Cases.

Petitioner filed no appellant's reply brief in his appeal, for the sole reason that he contemplated answer in oral

argument to some points in the unions' appellee brief.

On November 9, 1972, a notice mailed November 9 was received, advising counsel that the cases would be submitted on the briefs without argument and that appearance of counsel would not be necessary. That notice was received five days before argument was scheduled, eight months after filing of the appeals, after expenditure of tremendous effort and over $900 on petitioner's briefs.

Eighth Circuit Rule 6 is void, insofar as it purports to authorize denial of oral argument. Rule 34, Fed. R. App. P., clearly and unequivocally authorizes oral argument by use of such positive and affirmative phrases as "The clerk shall *advise all parties of the time and place at which oral argument will* be heard," " . . . each side will *be allowed 30 minutes for argument,*" "Requests [for additional time] . . . shall *be liberally granted if cause therefor is shown,*" "The appellant is entitled *to open and conclude the argument,*" and " . . . [on nonappearance of the appellee] the court will *hear argument on behalf of the appellant, if present.*" All emphasis in the foregoing quotations has been supplied by petitioner.

Rule 34(b) does permit a Court of Appeals to allow less than 30 minutes argument by each side, but only by adoption of a rule applicable either to all cases or to classes of cases. Such portion of the rule, under the caption "Time Allowed for Argument," by its context and by such caption, would seem to contemplate only a lessening of time for argument and not a complete elimination thereof.

Whether Rule 34(b) permits total elimination of argument need not be decided, since Eighth Circuit Rule 6 is applicable neither to "all cases" nor to "classes of cases."

It merely purports, without authority, to delegate an unguided discretion to a "Screening Panel" to determine that any case was one requiring no argument.

The authority for Courts of Appeals to make rules is found in Rule 47, Fed. R. App. P., and requires that such rules be "not inconsistent" with the Federal Rules of Appellate Procedure. Eighth Circuit Rule 6 is clearly inconsistent with Rule 34, Fed. R. App. P.

CONCLUSION

Because of each and all of the reasons set forth above, considered separately and collectively, the petitioner prays that a writ of certiorari issue to review the judgment entered on November 16, 1972, by the United States Court of Appeals for the Eighth Circuit.

Respectfully submitted,

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APPENDIX A

NOVEMBER 16, 1972 OPINION

In the United States Court of Appeals for the Eighth Circuit. Appeals from the United States District Court for the District of Nebraska.

No. 72-1207

DALE C. RICHARDSON, Appellant, v. COMMUNICATIONS WORKERS OF AMERICA, et al., Appellees.

No. 72-1220

DALE C. RICHARDSON, Appellee, v. COMMUNICATIONS WORKERS OF AMERICA, et al., Appellants.

Submitted: November 14, 1972.
Filed: November 16, 1972.

Before GIBSON and LAY, Circuit Judges, and DURFEE,* United States Court of Claims Judge.

PER CURIAM.

Plaintiff Dale C. Richardson filed an action for multiple claims against the Communications Workers of America, AFL-CIO, arising from his alleged wrongful discharge from employment with the Western Electric Company, Inc. In his first claim he sought damages against both the Union and his employer under § 301(a) of the Labor Management Relations Act, 1947. 29 U.S.C.A. § 185(a). In his second claim he sought damages for mental anguish arising from alleged

*Sitting by designation.

invidious discrimination directed against him for failing to join the Union. These claims were tried together, and on remand from this court[1] plaintiff recovered substantial damages on both claims. The trial court entered judgment on the verdict on the first claim but granted a new trial as to the award of damages on the claim arising out of the alleged invidious discrimination by the Union. The Union alone appealed the damages for wrongful discharge whereas the plaintiff has attempted to appeal the awarding of the new trial on the second claim.

After full consideration the court finds that it lacks jurisdiction to review the matters before it. It has long been settled that the granting of a new trial is not an appealable order. 6A Moore, Federal Practice & Procedure § 59.9[4], at 3853-3854 (1971). The granting of the new trial may be challenged on the abuse of discretion in an appeal only from the final judgment. See *Gallon v. Lloyd-Thomas Co.*, 261 F.2d 26, 27-28 (8 Cir. 1958).

Upon entry of judgment in the first claim the trial court did not certify the order as appealable under Rule 54(b) of the Federal Rules of Civil Procedure. This rule reads as follows:

> "When more than one claim for relief is presented in an action . . . the court may direct the entry of a final judgment upon one or more but less than all of the claims *only upon an express determination that there is no just reason for delay and upon an express direction for the entry of judgment.* In the absence of

[1] See our prior holding in the same case. *Richardson v. Communications Workers of America*, 443 F.2d 974 (8 Cir. 1971).

such determination and direction, any order or other form of decision, however designated, which adjudicates less than all the claims shall not terminate the action as to any of the claims, and the order or other form of decision is subject to revision at any time before the entry of judgment adjudicating all the claims." (Emphasis ours.)

Inasmuch as the order granting the motion for new trial is not appealable it necessarily follows that all claims still rest in the trial court. Being without jurisdiction the appeal must be dismissed. See *Gallon v. Lloyd-Thomas Co., supra.*[2]

The appeals are dismissed.

A true copy.

Attest:

Clerk, U. S. Court of Appeals,
Eighth Circuit.

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[2]As we stated in the *Gallon* case:

"When the case is ripe for appeal, this court will entertain the second appeal on the record and briefs prepared for the first appeal, insofar as applicable." 261 F.2d at 28.

MEMORANDUM AND ORDER

In the United States District Court for the District of Nebraska.

DALE C. RICHARDSON, Plaintiff, vs. COMMUNICATIONS WORKERS OF AMERICA, AFL-CIO, et al., Defendants.

CIVIL 02673.

[Filed February 29, 1972]

APPEARANCES:

For Plaintiff - Edward Fogarty, Esq.

For Defendant Unions - Robert O'Connor, Esq.

ROBINSON, Senior Judge.

THIS MATTER comes before the Court upon defendants' [Communications Workers of America, AFL-CIO and Communications Workers of America, AFL-CIO, Local 7495] for an order of remittitur by the plaintiff on both causes of action. The defendants further move that if the plaintiff refuses to remit that the defendants be granted a judgment notwithstanding the verdict or in the alternative be granted a new trial. [Filing No. 162].

The Court has fully considered the matter and given careful attention to all aspects and arguments of the pending motions. The parties have assisted with briefs and oral arguments.

The Court will first address the issue of the jury award of $250,000 damages against the defendant Unions for mental distress, anguish or humiliation. The Court cannot

logically conceive that such a verdict could have been based on the evidence adduced during the pendency of the trial. The subject of mental suffering is by necessity an abstract subject and it cannot be expected that damages can be computed with mathematical certainty, and the Court would not interfere if it were not of the firm opinion that the jury disregarded the evidence or the rules of law and rendered its verdict as the result of passion, prejudice, mistake, or some other improper reason. The Court now has the benefit of the guidance of the opinion of *Richardson v. Communications Workers of America,* 443 F.2d 974, 983 [8th Cir. 1971] wherein it is stated:

> "The damage arising from invidious discrimination against an employee by reason of his non-union membership may often times be measured only in terms of the mental distress, anguish and humiliation caused him."

Thus it is clear that the amount of the recovery should be measured by the damage caused, and not as a measure to punish the defendants. Punitive damages of course are not permitted in Nebraska. See *Roose v. Perkins,* 9 Neb. 304, 2 N.W. 715 [1879]; *Boldt v. Budwig,* 19 Neb. 739, 28 N.W. 280 [1886].

Now in this action there was no showing that the plaintiff was an especially sensitive, susceptible person or that he was especially vulnerable to injuries in the nature of mental distress. No evidence was presented which would support a finding that the emotional state cause, if any, was of a permanent and lasting nature, or that serious psychosomatic illnesses resulted. In short the evidence would only support a conclusion that the trauma caused,

if any, was of a temporary duration. The Court is not concerned that the trauma shown to have been suffered, if any, was not genuine but only is concerned with the evidence as it relates to damages suffered. It is clear that the verdict was excessive and intended to punish the defendants or resulted from some other improper reason. Yet the Court does not view the facts such that it would be proper to sustain a motion for remittitur because there is no way to effectively separate the proper elements of damage from those attributed to improper reasons. Thus a new trial on the issue of mental distress, anguish, or humiliation will be ordered.

But as to the verdict returned on the cause of action for lost wages, benefits and seniority rights the Court is satisfied that the award, although generous, was supported by the evidence and was proper in all other respects. The defendant Unions' argument that the International Union and the Local Union should have been treated separately for the purpose of this trial is without merit. The activity complained of was of an overt nature and continuing over a period of six [6] months. Even under traditional agency principles there was no issue for the jury. Moreover throughout the opinion of *Richardson v. Communications Workers of America, supra,* the Local and the International were treated as one entity. See also *Vulcan Materials Co. v. United Steelworkers of America,* 430 F.2d 446 [5th Cir. 1970]. Accordingly,

IT IS ORDERED that a new trial shall be held on the cause of action for mental distress, anguish, or humiliation.

IT IS FURTHER ORDERED that the defendant Unions' motion for a remittitur, judgment notwithstanding the verdict, or a new trial on the cause of action for lost

wages, benefits, and seniority rights should be and is hereby overruled, and a judgment will be entered.

Dated this 29th day of February, 1972.

BY THE COURT:

RICHARD E. ROBINSON

SENIOR JUDGE, UNITED STATES DISTRICT COURT

APPENDIX C

JUNE 4, 1971 OPINION

In the United States Court of Appeals for the Eighth Circuit. Appeals from the United States District Court for the District of Nebraska.

No. 20,326

DALE C. RICHARDSON, Appellant, v. COMMUNICATIONS WORKERS OF AMERICA, AFL-CIO; DISTRICT 7, COMMUNICATIONS WORKERS OF AMERICA, AFL-CIO; LOCAL 7495, COMMUNICATIONS WORKERS OF AMERICA, AFL-CIO; WESTERN ELECTRIC COMPANY, INC., Appellees.

No. 20,329

DALE C. RICHARDSON, Appellee, v. COMMUNICATIONS WORKERS OF AMERICA, AFL-CIO; DISTRICT 7, COMMUNICATIONS WORKERS OF AMERICA, AFL-CIO; LOCAL 7495, COMMUNICATIONS WORKERS OF AMERICA, AFL-CIO, Appellants.

No. 20,330

DALE C. RICHARDSON, Appellee, v. WESTERN ELECTRIC COMPANY, INC., Appellant.

[June 4, 1971.]

Before LAY, HEANEY and BRIGHT, Circuit Judges.

LAY, Circuit Judge.

This case brings to us issues of both liability and damages under § 301(a) of the Labor Management Relations Act, 1947. 29 U.S.C.A. § 185(a).[1] A jury returned a verdict of $20,000 in favor of Dale C. Richardson against both his former employer Western Electric Company, Inc. and the Communications Workers of America, AFL-CIO, its District 7 and its Local 7495 (hereafter Union) for breach of the existing collective bargaining agreement by reason of discrimination and wrongful discharge from employment. The complaint basically alleged violation of

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[1] Section 185(a) reads:

"Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties."

the collective bargaining contract wherein both the employer and the Union covenanted not to "discriminate, coerce or interfere with employees because of membership or non-membership in the Union."[2] The trial court reduced the verdict to $1,500 as the maximum recoverable due to the fact that the bargaining agreement "could have" terminated on March 20, 1967, some six and one-half months after the plaintiff's discharge.[3] On appeal the plaintiff alleges error in the trial court's (1) limitation of the damages to the life of the collective bargaining contract, and (2) refusal to allow evidence of mental anguish or to submit it to the jury as an element of damage. Defendant Western Electric cross-appeals from the denial of its motion for judgment notwithstanding the verdict. The Union contends on cross-appeal that the plaintiff's action should have been dismissed for failure to exhaust contractual remedies.

The plaintiff, Richardson, was originally employed in Minneapolis, Minnesota, by Western Electric on July 2, 1957. After transferring to Omaha, Nebraska, in 1962 he maintained his previous membership in the Communications Workers of America, AFL-CIO. At the time of his discharge on September 1, 1966, he had reached the highest grade

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[2]The full clause of the contract reads:

"2. Neither the Company nor the Union or any of their agents shall in any manner discriminate, coerce or interfere with employees because of membership or non-membership in the Union. The Company shall not discriminate against any Representatives of the Union because of any action taken in presenting grievances on behalf of such employees. Neither the Union nor the members, Representatives or Agents thereof shall intimidate or coerce any employee into membership or continuing membership therein."

[3]After discharge from Western Electric, plaintiff obtained employment as a police officer. It was stipulated between the parties that the maximum compensation lost by Richardson between discharge and expiration of the collective bargaining agreement was $1,500.

which an hourly employee could hold (Grade 5) and was second in seniority among the 164 hourly rated shop and warehouse employees in the Omaha plant. In 1965, Richardson became concerned over possible misuse of union funds and, getting no satisfactory explanation, he and two others withdrew from union membership in January of 1966. The withdrawal of the three left 161 employees as members of the Local. The evidence is that thereafter Richardson and the other two continuously received harassment and abuse both within the plant and outside it. Demonstrations against Richardson occurred daily in which the entire employee force took part. The record shows that obscenities were repeatedly directed at Richardson and the other two men by officers, stewards, and members of the Union. On September 1, 1966, Richardson and another employee got into an altercation. Richardson was discharged for violation of company rules.[4] The evidence disclosed that, at a meeting with management, the Union had urged Richardson's discharge.

The court submitted special interrogatories to the jury which it answered as follows:

> "QUESTION NUMBER ONE
>
> "DO YOU FIND FROM A PREPONDERANCE OF THE EVIDENCE REGARDING THE UNION'S CONDUCT TOWARD THE PLAINTIFF, FROM THE TIME HE DISCONTINUED HIS UNION MEMBERSHIP, THAT THE UNION WOULD HAVE FAILED TO FAIRLY AND IN

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[4] One Western Electric supervisor recommended to plaintiff that he resign rather than be discharged so he could be hired at another Western Electric plant.

GOOD FAITH REPRESENT THE PLAINTIFF IN HIS GRIEVANCE THROUGH THE STEPS OF THE GRIEVANCE PROCEDURE, INCLUDING ARBITRATION, IF PLAINTIFF HAD REQUESTED THE UNION TO DO SO?

"YES ✓ NO

"[If your answer to question number one is no, you need not proceed further]

"QUESTION NUMBER TWO

"DO YOU FIND FROM A PREPONDERANCE OF THE EVIDENCE THAT SECTION 25 OF THE COLLECTIVE BARGAINING AGREEMENT WHICH PROVIDES THAT, 'NEITHER THE COMPANY NOR THE UNION NOR ANY OF ITS AGENTS SHALL IN ANY MANNER DISCRIMINATE, COERCE, OR INTERFERE WITH EMPLOYEES BECAUSE OF . . . NON-MEMBERSHIP IN THE UNION . . . NEITHER THE UNION, NOR THE MEMBERS, REPRESENTATIVES OR AGENTS THEREOF SHALL INTIMIDATE OR COERCE ANY EMPLOYEE INTO MEMBERSHIP OR CONTINUING MEMBERSHIP THEREIN' WAS BREACHED IN REGARD TO THE PLAINTIFF BY:

[A] WESTERN ELECTRIC COMPANY, INCORPORATED

"YES NO ✓

[B] COMMUNICATIONS WORKERS OF AMERICA, AFL-CIO INTERNATIONAL LABOR ORGANIZATION

"YES ✓ NO

[C] COMMUNICATIONS WORKERS OF AMERICA, AFL-CIO LOCAL 7495
"YES✓ NO

"QUESTION NUMBER THREE

"DO YOU FIND FROM A PREPONDERANCE OF THE EVIDENCE THAT THE PLAINTIFF WAS WRONGFULLY DISCHARGED IN BREACH OF THE COLLECTIVE BARGAINING AGREEMENT BY THE DEFENDANT, WESTERN ELECTRIC COMPANY, INCORPORATED?

"YES✓ NO

"QUESTION NUMBER FOUR

"IF SO, DO YOU FIND FROM A PREPONDERANCE OF THE EVIDENCE THAT THE WRONGFUL DISCHARGE WAS PROXIMATELY CAUSED BY ACTIONS OF:

[A] COMMUNICATIONS WORKERS OF AMERICA, AFL-CIO AN INTERNATIONAL LABOR ORGANIZATION
"YES✓ NO

[B] COMMUNICATIONS WORKERS OF AMERICA, AFL-CIO LOCAL 7495
"YES✓ NO "

We pass first on plaintiff's claim against Western Electric.

It is now settled that an individual employee may, pursuant to § 301(a), litigate a claim for relief in federal court against an employer for wrongful discharge under a collective bargaining agreement. *Republic Steel Corp. v. Maddox*, 379 U.S. 650 (1965); *Humphrey v. Moore*,

375 U.S. 335 (1964); *Smith v. Evening News Ass'n,* 371 U.S. 195 (1962). Cf. *Textile Workers Union v. Lincoln Mills,* 353 U.S. 448 (1957). Although the trial court recognized this right, it limited plaintiff's damages to the period of time from the date of discharge to the termination date of the collective bargaining agreement. Western Electric justifies such limitation in reliance, *inter alia,* on *Rentschler v. Missouri Pac. R.R.,* 126 Neb. 493, 506, 253 N.W. 694, 700 (1934), which reads: "The contract between the union and the railroad company was limited to just one year, and therefore expired at the end of a year, and plaintiff could only recover for that period . . . " Federal law, however, controls substantive relief under § 301. *Textile Workers Union v. Lincoln Mills, supra* at 456-57. In *United Auto Workers v. Hoosier Cardinal Corp.,* 383 U.S. 696 (1966), the Supreme Court, discussing the applicable statute of limitations under Indiana law,[5] made it clear that a § 301 suit involves consideration of both the collective bargaining agreement and the hiring contract between the employee and employer. The Supreme Court observed:

> "Proof of the breach and of the measure of damages, however, both depend upon proof of the existence and duration of separate employment contracts between the employer and each of the aggrieved employees. Hence, this § 301 suit may fairly be characterized as one not exclusively based upon a written contract." *Id.* at 706.

Although the claim for wrongful discharge against the

[5]Where no federal statute of limitation exists, the federal law is that the state law then applies, 383 U.S. at 703-704. Cf. *Sandobal v. Armour and Co.,* 429 F.2d 249 (8 Cir. 1970).

employer arises out of the bargaining agreement, it is equally clear that the terms of the agreement do not create the job and that no specific obligation to hire flows from it. As has been often recognized, the collective bargaining agreement is not an ordinary contract but rather, in a sense, agglomerates a variety of rights and methodology relating to the employer, the union, and the employees. *United Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 578-81 (1960). Cf. *J. I. Case Co. v. NLRB*, 321 U.S. 332, 334-35 (1944). The employment relationships which arise under it do not exist separate from it in a vacuum totally void of other relevant circumstances. The expiration date of a bargaining contract does not place the employee in jeopardy of losing his job at the termination of the agreement. In fact one of the very incentives to union representation is job security. The employee, the union which represents him, the company which employs him, each contemplate a "subsisting" contractual relationship for an indefinite period of time. Cox, The Legal Nature of Collective Bargaining Agreements, 57 Mich. L. Rev. 1 (1958). Note, 61 Column. L. Rev. 1363 (1961). This is particularly true in established industries where continual dealings with a recognized union foster renewals and renegotiations. Furthermore, the employee, the union and the company are placed on notice that even after the bargaining agreement terminates the rights and obligations of the parties continue under the umbrage of the National Labor Relations Act. The obligation of the parties to bargain for new contracts is written into law. 29 U.S.C.A. § 158(a)(5). The company cannot exercise unilateral action detrimental to fair bargaining. *NLRB v. Katz*, 369 U.S. 736 (1962). Certain

rights flowing from seniority status may not be unilaterally changed without affording the union the opportunity to bargain. *Brotherhood of Locomotive Firemen and Enginemen v. Detroit & T. S. L. R.R.*, 421 F.2d 660 (6 Cir. 1970), cert. denied, 398 U.S. 927; *NLRB v. Cone Mills Corp.*, 373 F.2d 595 (4 Cir. 1967); *Industrial Union of Marine and Shipbuilding Workers v. NLRB*, 320 F.2d 615 (3 Cir. 1963), cert. denied, 375 U.S. 984 (1964). The collective bargaining agreement in addition recognizes seniority rights, which as here, affect vacation pay, severance pay, pension rights and the expectancy not to be laid off during slack periods of work. It has been recognized that many of these rights may survive the termination of the agreement. See e.g. *Zdanok v. Glidden Co.*, 288 F.2d 99 (2 Cir. 1961), aff'd 370 U.S. 530 (1962); cf. *United Brick & Clay Workers v. United Mine Workers*, No. 20,475 (8 Cir., filed March 5, 1971).

The above discussion is germane for realization that an employee wrongfully discharged under a collective bargaining agreement, as exists here, suffers more than just the loss of a job itself. His damage must be appraised in terms of not only his wages, but the loss of seniority and the benefits which flow from it; he has thus lost his reasonable expectancy as to his continued employment. To measure this loss only to the expiration of an existing bargaining agreement fails to take into consideration the realities existing. It is true that this expectancy of continued employment might expire if the company goes out of business or if the collective bargaining agreement is not renewed with the union. But cf. *Local 127, United Shoe Workers v. Brooks Shoe Mfg. Co.*, 298 F.2d 277 (3 Cir. 1962); *Zdanok*

v. Glidden Co., supra. However, as these factors affect the employee's expectancy of work, in the present case they are even less contingent than the employee's possible contemplation of his own death or unforeseen disability. None of these considerations provide an automatic bar to a recovery for future wages beyond the termination of the bargaining agreement.

Federal jurisdiction under § 301 is more than a proving ground for breach of employment contracts; it is rather a statutory ground for suits brought to implement labor policy as suggested by the Labor Management Relations Act. *Textile Workers Union v. Lincoln Mills, supra* at 456-57. When an employee's expectancy of employment is challenged by invidious discrimination of the company or the union arising from his nonunion membership, the law should not react niggardly as to realization of his whole damage. As the Supreme Court has written, "there are problems so vital to the implementation of federal labor policy that they will command a high degree of inventiveness from the courts." *United Auto Workers v. Hoosier Cardinal Corp., supra* at 701. See also *Vaca v. Sipes,* 386 U.S. 171 (1967); *John Wiley & Sons v. Livingston,* 376 U.S. 543 (1964); *Textile Workers Union v. Lincoln Mills, supra; United Steelworkers v. Blaw-Knox Foundry & Mill Mach. Inc.*, 319 F.Supp. 636, 640 (W.D. Pa. 1970); *Sidney Wanzer & Sons, Inc. v. Milk Drivers Union, Local 753,* 249 F.Supp. 664, 671 (N.D. Ill. 1966). In view of the character of work here involved, the time the plaintiff had been with the company, the strong likelihood of his future employment with the company, the probability of renewal of the collective bargaining agreement, the severance of seniority rights, we

deem future damages extending beyond the date of any collective bargaining agreement recoverable under § 301. See *De Arroyo v. Sindicato de Trabajodores Packinghouse*, 425 F.2d 281 (1 Cir. 1970), cert. denied, 400 U.S. 877; *Thompson v. Brotherhood of Sleeping Car Porters*, 367 F.2d 489 (4 Cir. 1966), cert. denied, 386 U.S. 960 (1967); *Local 127, United Shoe Workers v. Brooks Shoe Mfg. Co.*, *supra*. We thus conclude that it was error to limit plaintiff's damage by the expiration date of the collective bargaining agreement.

We move now to discussion as to the liability and damages against the Union.

The plaintiff pleaded and tried his case on the theory that the Union breached the collective bargaining agreement as to the nondiscrimination clause. Assertion of the claim against the Union for breach of contract misconstrues the relationship between the parties to a collective bargaining agreement. The Union is signatory to the agreement on behalf of all the employees. It thus serves in the capacity of a fiduciary to the employees. See, generally Cox, *supra*, 57 Mich. L. Rev. at 21. In fact, the rights of the individual employees are the "major focus" of the bargaining contract with the company. *Smith v. Evening News Ass'n*, *supra* at 200. Breach of the agreement by the bargaining agent, which simultaneously conflicts with its role as a fiduciary to the employee, creates a claim for breach of trust of its statutory duty to give adequate representation and not for one arising out of the collective bargaining contract.[6] Cf. Restatement

[6] As the Supreme Court recognized in *Vaca v. Sipes*, 386 U.S. 171, 177 (1967):

> "It is now well established that, as the exclusive bargaining representative of the employees in Owens' bargaining unit, the Union had a statutory duty fairly to represent all of those employees both in its

of Trusts § 192 (1935). The role of the union as a bargaining agent for all employees, including nonunion employees, is governed by the National Labor Relations Act and only incidentally by the bargaining contract with the company. *Conley v. Gibson*, 355 U.S. 41, 46 (1957). Cf. *Seay v. McDonnell Douglas Corp.*, 427 F.2d 996 (9 Cir. 1970). Where union discrimination against a nonunion employee ensues, the employer may choose to enjoin the union and enforce the contract clause for the sake of industrial harmony under § 301. However, when the employee seeks individual relief arising from union discrimination he need only look to the statutory duty of the union to adequately represent him. The fact that the Union's duty not to discriminate arose from its statutory duty rather than, as pleaded, from the bargaining contract should not affect plaintiff's basic claim under § 301.[7]

(6 cont'd)

collective bargaining with Swift, see *Ford Motor Co. v. Huffman*, 345 U.S. 330; *Syres v. Oil Workers International Union*, 350 U.S. 892, and in its enforcement of the resulting collective bargaining agreement, see *Humphrey v. Moore*, 375 U.S. 335. The statutory duty of fair representation was developed over 20 years ago in a series of cases involving alleged racial discrimination by unions certified as exclusive bargaining representatives under the Railway Labor Act, see *Steele v. Louisville & N. R. Co.*, 323 U.S. 192; *Tunstall v. Brotherhood of Locomotive Firemen*, 323 U.S. 210, and was soon extended to unions certified under the N. L. R. A., see *Ford Motor Co. v. Huffman, supra. Under this doctrine, the exclusive agent's statutory authority to represent all members of a designated unit includes a statutory obligation to serve the interests of all members without hostility or discrimination toward any, to exercise its discretion with complete good faith and honesty, and to avoid arbitrary conduct. Humphrey v. Moore*, 375 U.S., at 342." (Emphasis ours.)

[7] Compare this court's analysis of the pleadings in a complicated construction damage suit, *Peter Kiewit Sons' Co. v. Summit Constr. Co.*, 422 F.2d 242 (8 Cir. 1969), where we said:

"Indeed, there are some old cases which condemned pleadings in which alternative or inconsistent allegations or theories were so intermingled that the court was unable to determine what the plaintiff was alleging. *Catanzaritti v. Bianco*, 25 F.Supp. 457 (M.D. Pa. 1938); see generally 2A J. Moore, Federal Practice, para. 8.33, at 1893 (1968 ed.). Nevertheless, though Summit's amended complaint is hardly simple, concise and direct, Summit's overlapping and duplicative allegations of breach of contract, intentional interference with a contractual relation, and quantum meruit for extra work were sufficiently clear and understandable that Kiewit was not prejudiced thereby. The number and

Whether the claim against the Union be described as one in tort (*De Arroyo v. Sindicato de Trabajadores Packinghouse, supra*) or simply as one resting on breach of trust under a statutory duty, it is clear that the action does not rest on strict principles of contract law. This fact places further emphasis on the error of restricting the damages for the wrongful discharge to the time span of the collective bargaining agreement.

The focal issue in a § 301 suit is the employer's non-compliance with the collective bargaining agreement and the union's complicity in that breach. Joinder of a union in a § 301 suit satisfies two basic purposes: (1) it facilitates proof in one acton that the union has either refused to process this employee's grievance or that because of the union's arbitrary conduct it would have been futile to seek the union's assistance to process the grievance,[8] (cf. *Republic Steel Corp. v. Maddox*, 379 U.S.650 (1965)); and (2) it allows a determination of the portion of damages, if any, that the union should bear. *Vaca v. Sipes*, 386 U.S. 171, 196-98 (1967).

A union's liability under § 301 is only incidentally premised on invidious discrimination directed against an employee. Bad faith of the union becomes essential proof to obviate the necessity of an employee exercising the grievance machinery before seeking court relief from the

(7 cont'd)

variety of issues alone made for extensive pleadings in this case. Understandably, duplications of factual allegations ofttimes are necessary to place a series of claims in proper context." *Id.* at 271.

[8]The jury found that the Union breached this duty by its affirmative answer in Interrogatory No. 1. This was clearly an issue of fact properly submitted to the jury. There is no merit to the Union's cross-appeal that plaintiff failed to exhaust his remedies under the collective bargaining agreement.

company. *Vaca v. Sipes, supra* at 185-86. Where the union's breach of duty involves only a failure to process an employee's grievance, its apportioned damage arising from the unrelated wrongful discharge is usually de minimus. *De Arroyo v. Sindicato de Trabajadores Packinghouse, supra.* Cf. *Waters v. Wisconsin Steel Workers of International Harvester Co.*, 427 F.2d 476, 491 (7 Cir. 1970), cert. denied, 400 U.S. 911. Under such circumstances, the employer is solely responsible for the damages flowing from the breach of contract. As the Supreme Court said in *Vaca:*

> "The governing principle, then, is to apportion liability between the employer and the union according to the damage caused by the fault of each. Thus, damages attributable solely to the employer's breach of contract should not be charged to the union, but increases if any in those damages caused by the union's refusal to process the grievance should not be charged to the employer. In this case, even if the Union had breached its duty, all or almost all of Owens' damages would still be attributable to his allegedly wrongful discharge by Swift." 386 U.S. at 197-98.

However, under the above principles, where the union also wrongfully induces the discharge, it follows that its liability for damages may be apportioned to the extent that it is responsible for the whole of such damage. Cf. *Vaca v. Sipes, supra* at 197 n. 18; *Humphrey v. Moore*, 375 U.S. 335 (1964).

In the ordinary case where the union has defaulted in its responsibility to process an employee's grievance or has wrongfully induced a breach of the collective bargaining

agreement by the employer, damages for mental anguish have generally been rejected,[9] but in any event would be slight compared to an employee's damage for loss of wages. We hold, at least in this instance, that the denial of damages for mental distress related to the breach of the collective bargaining agreement was proper.

However, the overall claim asserted here goes beyond the mere failure of the Union to process the employee's grievance with the company. As discussed, we construe plaintiff's complaint, although inartistically drawn in terms of the Union's breach of the collective bargaining agreement, as one which basically challenges the Union's role as a fiduciary in failing to adequately represent the employee. The complaint alleges, and the evidence and jury findings demonstrate, three basic violations of that duty: (1) wrongfully inducing the company to discharge the employee; (2) bad faith in failing to process the plaintiff's grievance; and (3) invidious discrimination directed against the plaintiff by reason of his nonunion membership.

Apropos is the Fourth Circuit's observation in the first appeal of *Thompson v. Brotherhood of Sleeping Car Porters*, 316 F.2d 191, 197 (4 Cir. 1963):

> "[D]isparate treatment in representation cannot be tolerated when based on the disadvantaged individual's or group's non-membership in the statutory bargaining agent. Such disparity in treatment constitutes a conspicuous example of forbidding discrimination that is not necessarily

---

[9] *De Arroyo v. Sindicato de Trabajadores Packinghouse, supra; St. Clair Teamsters Local 515*, 422 F.2d 128 (6 Cir. 1969); *Brady v. Trans World Lines, Inc.*, 244 F. Supp. 820 (D. Del. 1965).

> related to race. Depending upon the facts, it may violate the bargaining agent's statutory duty of fair representation. A union has no more justification to discriminate injuriously in its representation on the ground of non-membership, or instability of membership, or even because of persistent and vocal complaints or other obnoxious behavior, than it has to discriminate on account of skin pigmentation. None of these circumstances is relevant to the fair and proper discharge of a union's duty to those it is empowered to represent and whose employment is governed by its binding agreements."

As stated in *Vaca*, the duty is breached when "a union's conduct toward a member of the collective bargaining unit is arbitrary, discriminatory, or in bad faith." 386 U.S. at 190.

During the trial plaintiff's claim for mental anguish was dismissed without prejudice. The district court did so to permit that claim to be filed in state court.[10] The district court construed the claim for mental anguish as separately pleaded and as accompanying plaintiff's § 301 claim under ancilliary or pendent jurisdiction. The court stated it was dismissing the claim within its discretion to refuse to exercise pendent jurisdiction. The dismissal against the Union is challenged here.[11]

---

[10] Although there may have been a cause of action against the Union (perhaps in terms of tortious interference with a contract) which could have been filed in state court, we express some concern over the duplicity of damage in that claim and the one alleged here under § 301.

[11] Plaintiff does not address himself to any dismissal of his claim for mental distress against the individual union members. Section 301(b) (29 U.S.C.A. § 185(b)) allows money damages to be recovered under the Act only from the union and not from the individual members. On retrial the claim for intentional discrimination should proceed only against the Union.

The claim against the Union for intentional discrimination, as discussed above, involves a federal right. *Vaca v. Sipes, supra* at 177; *Ford Motor Co. v. Huffman*, 345 U.S. 330, 337 (1953); *Steele v. Louisville & N. R.R.*, 323 U.S. 192, 198-99 (1944). This claim, as we view it, is separate and distinct from the Union's responsibility for its apportioned damage with the employer under § 301(a). There is no procedural bar to asserting this claim along with plaintiff's suit under § 301(a). In fact, litigation of all concurrent claims in one lawsuit should be encouraged. Cf. *Desrosiers v. American Cyanamid Co.*, 377 F.2d 864, 871 (2 Cir. 1967). The damage arising from invidious discrimination against an employee by reason of his nonunion membership may often times be measured only in terms of the mental distress, anguish and humiliation caused him. The evidence is that plaintiff was subject to malicious treatment for over six months before his discharge.[12]

[12] Vile and derogatory signs estimated at 1,000 in number were posted around the plant referring to "scabs"; they were taped to concrete columns, onto machinery, on the walls, in the rest rooms, etc., and drawn on supply cartons. When plaintiff or one of the two other nonunion men would enter the shop a chant of "scab! scab! scab!" to the accompaniment of foot-stomping and hand-clapping, would be raised by "everybody." Company officials claimed they were helpless to intervene since a man might just be mouthing the words and the Union would protest any unwarranted discipline. On several occasions Richardson's car was blocked in the parking lot at quitting time by union members' (one of whom was the Local's president) "stalled" cars. In one such instance the nonunion car was surrounded by some thirty union members who, chanting, jeering, and gesturing at the nonunion occupants, invited them across the street where about fifteen others waited to fight. Union officials took part in many of the intended harassments.

While at work Richardson was constantly pelted by a rain of nuts, bolts, and screws thrown at him by other employees. Other methods of harassment included constant pushing and shoving, challenges to fight and threats of violence, burning Richardson with a cigarette, dropping a lighted cigarette down his back, calling his wife vulgar names and attributing to her unnatural sex acts, deflating his automobile tires, placing a beer bottle behind his tires, squeezing a tube of grease in his tool drawer, and padlocking his locker. Not long after he resigned from the Union, the tires of his car were slashed while it was parked at his home.

During the nearly seven months of his nonunion employment, union men involved Richardson in three separate fights. In May, an employee by the name of Reber entered Richardson's work area, and after calling his wife a whore, asked him to sign a statement that he (Richardson) had challenged Reber to a

In measuring damage under federal law a federal court may look to both federal and state laws, "whichever better serves the policies expressed in the federal statutes." *Sullivan v. Little Hunting Park, Inc.*, 396 U.S. 229, 240 (1969). Mental distress has long been recognized as an element of damage for intentional wrongs in the State of Nebraska. *Herbrick v. Samardick & Co.*, 169 Neb. 833, 101 N.W.2d 488 (1960); *Doescher v. Robinson*, 132 Neb. 299, 271 N.W. 784 (1937); *LaSalle Extension University v. Fogarty*, 126 Neb. 457, 253 N.W. 424 (1934); *Netusil v. Novak*, 120 Neb. 751, 235 N.W. 335 (1931); *Kurpgeweit v. Kirby*, 88 Neb. 72, 129 N.W. 177 (1910). Mental distress has generally been recognized to be compensible in instances arising from intentional wrongs including invasion of privacy and denial of civil rights. *Time Inc. v. Hill*, 385 U.S. 374, 385 n. 9 (1967); *Donovan v. Reinbold*, 433 F.2d 738, 743 (9 Cir. 1970); *Moore v. Greene*, 431 F.2d 584, 590-91 (9 Cir. 1970); *Rhoads v. Horvat*, 270 F. Supp. 307 (D. Colo. 1967); *Solomon v. Pennsylvania R.R.*, 96 F. Supp. 709, 712 (S.D. N.Y. 1951); *Massachusetts Com-*

(12 cont'd)
fight. Richardson struck Reber three times. Both were suspended by the company, Richardson for three weeks, Reber for two weeks. The Union activated a half-day wildcat strike in sympathy for Reber and filed a grievance on his behalf; none was filed for Richardson. On August 31, a union member raced ahead of Richardson to a water fountain. Richardson felt that the man was provacatively dawdling, so he removed the man's hand from the button, moved him aside, and drank from the fountain. A member of the Union standing nearby rushed to the man's side and asked him if he was hurt, to which the man replied: "Yeah, yeah, my back hurts." The next day, September 1, one Korytowski, a union member, tried to provoke Richardson in the parking lot. He kicked Richardson who returned the blow and called the offender a bastard. Later that day the company discharged Richardson.

Company officials testified as to the presence of the signs around the plant, the chanting, and the hurling of small items at the nonunion men but claimed that they were helpless to do anything about it without direct evidence from one of the supervisors. The only company intervention was a letter of warning to the Union and several oral requests to the Local's officers to settle the matter. During a meeting in the plant manager's office, the firing of Richardson was urged by the Local's president, its vice-president, its treasurer and its representative. At another union-management meeting, "concurrent" with Richardson's September 1 discharge, the Union took the position that the discharge was accurate. The Union did not file a grievance on his behalf.

mission against Discrimination v. Pranzaroli, . . . Mass. . . . , 256 N.E.2d 311 (1970); *Alcorn v. Anbro Engineering, Inc.*, 86 Cal. Rptr. 88, 468 P.2d 216 (1970); Duda, Damages for Mental Suffering in Discrimination Cases, 15 Cleve. Mar. L. Rev. 1 (1966).[13]

Although plaintiff's claim might have been asserted in state court, we feel it was error to assume that the claim against the Union was not a federal right and not within the jurisdiction of the federal court. Since the case is to be remanded for reconsideration of damages under § 301, we deem it appropriate that plaintiff amend his complaint to separately assert his claim against the Union

---

[13] In two cases prior to the recognition of the right of an employee to seek relief under § 301 in federal court, the Supreme Court approved the right of an employee to collect damages for mental anguish under state law. In *Machinists v. Gonzales*, 356 U.S. 617 (1958), the employee had sued the union in state court for wrongful ouster from the union, seeking reinstatement and damages for lost wages and physical and mental suffering. The verdict was for the plaintiff. The union appealed contending that the action sued upon constituted an unfair labor practice and that, therefore, the sole remedy was a complaint to the National Labor Relations Board. The Court held that even though the Board was empowered to award back pay and order reinstatement it could not "mulct in damages for mental or physical suffering. And the possibility of partial relief from the Board does not, in such a case as is here presented, deprive a party of available state remedies for all damages suffered." 356 U.S. at 621. The Court then distinguished the nature of the Board proceedings from those of the state court:

> "The state court proceedings deal with arbitrariness and misconduct vis-a-vis the individual union members and the union; the Board proceeding, looking principally to the nexus between union action and employer discrimination, examines the ouster from membership in entirely different terms.' Isaacson, Labor Relations Law: Federal versus State Jurisdiction, 42 A.B.A.J. 415, 483." 356 U.S. at 622-23.

In a strong dissent urging the exclusion of labor cases in any form from state jurisdiction for the sake of uniformity, Chief Justice Warren implied that the *Gonzales* opinion brought mental damages within the scope of federal labor policy:

> "The right of action for emotional disturbance, like the punitive recovery the plaintiff sought unsuccessfully in this case, is a particularly unwelcome addition to the scheme of federal remedies because of the random nature of any assessment of damages. Without a reliable gauge to which to relate their verdict, a jury may fix an amount in response to those 'local procedures and atittudes toward labor controversies' from which the *Garner* case sought to isolate national labor regulation. The prospect of such recoveries will inevitably exercise a regulatory effect on labor relations." *Id.* at 628.

See also *United Auto Workers v. Russell*, 356 U.S. 634, 641 (1958).

for mental distress arising from the intentional discrimination.[14] Cf. *Abrams v. Carrier Corp.*, 434 F.2d 1234 (2 Cir. 1970).

This brings us to Western Electric's cross-appeal.

Western Electric asserts that the jury's answer to Interrogatory No. 2(A), i.e. that Western Electric did not breach the anti-discrimination clause of the contract, defeats plaintiff's claim since this was the only breach of the contract alleged by the plaintiff. However, this overlooks that the jury found that Western Electric did wrongfully terminate Richardson's employment under the agreement. The trial court instructed:

> "That provision in the collective bargaining agreement did not permit the company or union to discriminate, coerce, or interfere with any employee because of his non-membership in the union or to coerce any employee into union membership and/or, in the alternative, that the collective bargaining agreement did not permit the discharge of an employee from his employment without a justified reason.
>
> "That the acts or omissions of a particular defendant severally or jointly amounted to a breach of the collective bargaining agreement in one or both of the above ways."

Western Electric pleaded that its discharge of plaintiff was pursuant to Article 33, Sections 2 and 2.2 of the collective bargaining agreement which in essence provide for termination on serious violation of the company rules. The jury's

[14] Since this claim was not submitted to the jury the jury must pass anew on both liability and damages. The employer has been found innocent of violating the nondiscrimination clause of the contract and cannot in any way be responsible for this damage.

finding under Interrogatory No. 3 that Western Electric wrongfully discharged plaintiff, unquestionably found the company's defense pretextual. We find no inconsistency in the answers to the two interrogatories. The employer's discharge of Richardson, induced by the Union's disdain for a nonunion member, was violative of the bargaining agreement even though the company was not found to be guilty of violating the nondiscrimination clause. We find no merit in Western Electric's cross-appeal.

In summary, the cross-appeals of the Union and Western Electric are denied; we order a new trial limited solely to the damage issues as to the claim for relief under § 301. The jury is entitled to hear the evidence as to the Union's activity in inducing the plaintiff's wrongful discharge so that it may then apportion the damages between the company and the Union on the basis of their respective roles in causing the breach. See *Czosek v. O'Mara*, 397 U.S. 25 (1970); *Vaca v. Sipes, supra.* The damages should encompass all those elements which may have been contemplated by the parties to arise from the breach of the bargaining agreement as it affected plaintiff's employment with Western Electric. The award of damages should embrace future earnings and an evaluation of any seniority rights which plaintiff might have had and has now lost.

Plaintiff is to be given leave to plead against the Union, as a separate count, damages for mental distress for the alleged violation of its statutory duty to avoid intentional discrimination against him up to and including the time of his discharge.

Reversed and remanded.

A true copy, etc.

ORDER AND FINAL JUDGMENT

In the United States District Court for the District of Nebraska.

DALE C. RICHARDSON, Plaintiff, v. COMMUNICATION WORKERS OF AMERICA, AFL-CIO, et al., Defendants.

CIVIL NO. 02673.

Order

[Filed December 4, 1972]

On February 29, 1972, this court entered an order overruling the motions for remittur, judgment notwithstanding the verdict, and new trial filed by defendants Communication Workers of America, AFL-CIO, and Communication Workers of America, AFL-CIO, Local 7495, which motions were directed to plaintiff's first cause of action, and sustained the motion for new trial of the same defendants as to plaintiff's second cause of action. The Court has now determined that there is no just cause for delay of the entry of a final judgment upon plaintiff's first cause of action as to both defendants and that such final judgment should now be entered pursuant to Rule 54(b) of the Federal Rules of Civil Procedure.

WHEREFORE, IT IS ORDERED that the undersigned having expressly determined that there is no just cause for delay in the entry of judgment upon plaintiff's first cause of action against defendants Communication Workers of America, AFL-CIO, and Communication Workers of America, AFL-CIO, Local 7495, the Clerk of this Court is

hereby directed to enter judgment in favor of plaintiff and against both such defendants upon plaintiff's first cause of action.

DATED this 1st day of December, 1972.

BY THE COURT:
Richard E. Robinson
Senior Judge, United States
District Court

†

Final Judgment
[Filed December 5, 1972]

[Captioned as above]

Pursuant to the Court's Order of December 1, 1972, upon the express determination that there is no just cause for delay in the entry of final judgment upon plaintiff's first cause of action;

IT IS ORDERED that plaintiff recover of and from the defendants Communication Workers of America, AFL-CIO, and Communications Workers of America, AFL-CIO, Local 7495, jointly or severally the sum of $64,400.00, with interest and 70% of his costs of action.

Dated this 5th day of December, 1972.

BY THE COURT:
Richard C. Peck, Clerk
By William L. Olson
Chief Deputy Clerk

ENTERED ON THE DOCKET
December 5, 1972

MOTION

In the United States District Court for the District of Nebraska.

DALE C. RICHARDSON, Plaintiff, vs. COMMUNICATIONS WORKERS OF AMERICA, AFL-CIO; COMMUNICATIONS WORKERS OF AMERICA, AFL-CIO, LOCAL 7495, et al., Defendants.

CIVIL NO. 02673.

[Filed October 9, 1972]

COMES NOW the defendants, Communications Workers of America, AFL-CIO, and Communications Workers of America, AFL-CIO, Local 7495, and move that the Court order a remittitur by the plaintiff for the reason that the verdict as to damages on both Cause of Action No. 1 and Cause of Action No. 2 are excessive and against the clear weight of evidence. That if the plaintiff refuses to remit, these defendants move for an order of the Court vacating and setting aside the verdict of the jury on the plaintiff's first and second cause of action and granting these defendants a judgment notwithstanding the verdict, or in the alternative, a new trial for the following reasons:

I

The verdict is not sustained by sufficient evidence.

II

The damages awarded by the jury were so excessive as to celarly establish they resulted from factors not admitted in evidence.

III

That the instructions regarding the defendant international union and the defendant local union should have been more clearly stated as to their organizations, duties and obligations which would bind or hold the international union liable for alleged acts of the defendant local union, its officers, stewards or members.

IV

That the instructions should have stated at any point regarding stewards and members that the jury must determine that these individuals were acting within the scope of the agency of the local or international union.

V

That the instructions of the Court regarding the acts of the defendant unions included the acts of the stewards and members of the local union without explanation that any acts by members or stewards must have been designated or directed by the local or international union prior to the commission of alleged acts or such alleged acts ratified by the international or local union after the acts had been committed.

VI

That there was no instruction regarding the acts of individual members acting in their own behalf after working hours and away from the plant.

VII

That the plaintiff's attorney was permitted to argue, over objection of these defendants' attorney, "the golden rule" or requesting that the jury put themselves in the place of the plaintiff for the alleged acts which constituted mental anxiety and distress and alleged loss of earnings to

date and in the future.

VIII

That the verdict is contrary to the law.

IX

That the verdict is not sustained by the evidence.

X

That the evidence introduced on the behalf of the plaintiff failed to meet the burden imposed by 29 U.S.C.A. 106 to establish that the acts complained of were chargeable to these defendants.

XI

That the damages allowed by the jury in both causes of action was not sustained by the evidence and are contrary to the charge of the Court as to the measure thereof.

XII

That the Court erred in submitting the second cause of action to the jury for the reason that there was no evidence which would sustain a verdict showing that the defendant international union or the defendant local union was responsible for any alleged acts of harassment which may have produced mental anxiety.

XIII

That as to the verdict on the second cause of action, the amount of damages awarded was punitive, exemplary and excessive. That the plaintiff's counsel was permitted to argue exemplary damages even though the instructions of the Court stated that punitive and exemplary damages would not be permitted in the jury's verdict.

XIV

That the form of the verdict was incorrect in that it should have stated verdicts against the defendant international

union and the defendant local union separately rather than jointly.

COMMUNICATIONS WORKERS OF AMERICA, AFL-CIO

COMMUNICATIONS WORKERS OF AMERICA, AFL-CIO, LOCAL 7495,

Defendants,

By Attorney for Defendants
Robert E. O'Connor
1304 City National Bank Building
Omaha, Nebraska 344-0570

Certificate of mailing attached indicating mailing to Mr. Edward F. Fogarty, 717 Service Life Building, Omaha, Nebraska (one of the attorneys for plaintiff) and also a copy to Mr. Hird Stryker of Fraser, Stryker, Marshall & Veach, 510 Electric Bldg., Omaha, Nebraska.

APPENDIX F

CALENDAR OF CASES FOR SUBMISSION AT THE NOVEMBER SESSION, 1972, AT ST. LOUIS, MISSOURI

United States Court of Appeals, Eighth Circuit.
St. Louis, Mo., October 18, 1972.

NOTICE TO COUNSEL:

The session of the Court for the submission of the following cases will be held at St. Louis, Missouri, in the United States Court House and Custom House, located at Twelfth and Market Streets, St. Louis, Missouri. All divisions of the Court will convene daily at 9:00 A.M.

*Cases on the calendar that have been marked with an

asterisk will be limited to a total of 40 minutes argument divided 20 minutes for appellant or petitioner and 20 minutes for appellee or respondent.

Counsel should report to the Clerk's office, Room 530, at least 15 minutes prior to the convening of court to advise who will make oral argument.

Robert C. Tucker, Clerk.

MONDAY, NOVEMBER 13, 1972

Division No. 1

72-1049.	Blair H. Raycraft v. Duluth, Missabee, and Iron Range Railway Co.
*71-1720.	McDonnell Douglas Corporation v. National Labor Relations Board.
*72-1009.	Wilmer K. Calvin, Jr. v. Roy Rupp, etc., et al.
72-1074.	Russell Michael, et al. v. Prudential Insurance Company of America.
72-1083.	Russell Michael, et al. v. Prudential Insurance Company of America.

Division No. 2

71-1651.	United States of America v. Cooperative Grain & Supply Co., et al.
71-1652.	United States of America v. Cooperative Grain & Supply Co., et al.
71-1653.	United States of America v. Cooperative Grain & Supply Co., et al.
71-1666.	United States of America v. Cooperative Grain & Supply Co., et al.
71-1667.	United States of America v. Cooperative Grain & Supply Co., et al.
71-1668.	United States of America v. Cooperative Grain & Supply Co., et al.
72-1115.	National Labor Relations Board v. Midwest Hanger Co., et al.
72-1123.	Gloria M. Lohman v. General American Life Insurance Co., et al.
*72-1039.	Slay Warehousing Co., Inc. v. Reliance Insurance Co.

TUESDAY, NOVEMBER 14, 1972

Division No. 1

72-1156. In the Matter of Weismantel Associates, Inc., a corp., Debtor. Neal Henschel, et al. v. Weismantel Associates, Inc.

72-1306. Securities and Exchange Commission v. First American Bank and Trust Co., etc., et al.

72-1313. Securities and Exchange Commission v. First American Bank and Trust Co., etc., et al.

*72-1150. National Labor Relations Board v. Georgia-Pacific Corp.

*72-1151 National Labor Relations Board v. Skelly Oil Co., etc.

Division No. 2

72-1220. Dale C. Richardson v. Communications Workers of America, etc., et al.

72-1207. Dale C. Richardson v. Communications Workers of America, etc., et al.

72-1307. Midcontinent Broadcasting Co. v. North Central Airlines, Inc.

*72-1195. Henry W. Sohosky, et al. v. Commissioner of Internal Revenue.

*72-1197. Betty J. Urian v. Jack Milstead.

WEDNESDAY, NOVEMBER 15, 1972

Before the Court En Banc

*71-1691. United States v. Robert Michael Woosley.

71-1727. United States v. Joseph Arthur Bozada.

72-1258. United States of America v. James Marihart, et al.

Division No. 1 at 1:30 P.M.

72-1196 John L. Krall, etc., et al. v. Crouch Brothers, Inc.

72-1211. Barbara Ludvicek v. Crouch Brothers, Inc.

72-1406. Delores Clark, et al. v. Board of Education of the Little Rock School District, et al.,

THURSDAY, NOVEMBER 16, 1972

Division 1

72-1228.	United States of America v. Ethelburt Walker.
72-1250.	United States of America v. Norman Lee Williams.
*72-1263	United States v. John Matthew Glavan.
*72-1266.	United States v. Edward Hurse.
*72-1283.	Fairmont Foods Co. v. National Labor Relations Board.
*72-1334.	United States of America v. Narcisse Lufkins.

Division 2

72-1365.	Wayne Goham v. Charles Wolff.
72-1366.	Dennis Tyndall v. Charles Wolff.
*72-1047.	Hospital Television, Inc. v. Wells Television, Inc., et al.
*72-1280.	United States v. William Owens.
*72-1315.	United States v. William J. Rajewich.
*72-1335.	United States v. David George Culp.

FRIDAY, NOVEMBER 17, 1972

Division No. 1

*72-1358.	United States of America v. Ronald X. Pleasant.
*72-1374.	United States v. G. Stanley Rischard.
*72-1409.	United States v. Theodore Douglas Dooley.
*72-1159.	National Labor Relations Board v. Southern Paper Box Co.

Division No. 2

*72-1149	National Labor Relations Board v. The Freeman Co.
*72-1319.	DeLloyd L. Meyer v. Bankers Dispatch Corp.
*72-1385.	Donna Jean Austin v. Don R. Erickson, etc.
72-1563.	In the Matter of Grand Jury Proceedings Frank J. Duffy v. United States of America.

The following cases will be submitted to the Court on the briefs of the parties and without oral argument on either side. For record-keeping purposes, the date of submission is to be shown as Friday, November 17, 1972.

Division 1

72-1055.	James Vest, et al., v. National Lead Co.

Division 2

72-1282	Ray Stock v. Badger Body and Truck Equipment Co.

STATE OF CALIFORNIA)
) ss.
County of Orange)

I, the undersigned, say: I am and was at all times herein mentioned, a citizen of the United States and employed in the County of Orange, State of California, over the age of eighteen years and not a party to the within action or proceeding; that

My business address is 326½ Main Street, Huntington Beach, California 92648, that on March 2nd, 1973, I served the within PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT (Richardson v. Communications Workers of America, etc. et al.) on the following named parties by depositing copies thereof, enclosed in a sealed envelope with postage thereon fully prepaid, in the United States Post Office in the City of Huntington Beach, California, addressed to said parties at the addresses as follows:

J. PATRICK GREEN, Attorney at Law
707 CITY NATIONAL BANK BUILDING
OMAHA, NEBRASKA 68102 — 2 copies

ROBERT E. O'CONNOR, Attorney at Law
1304 CITY NATIONAL BANK BUILDING
OMAHA, NEBRASKA 68102 — 2 copies

SOLICITOR GENERAL OF THE UNITED STATES
U. S. Department of Justice
Washington, D. C. 20530 — 3 copies

I declare under penalty of perjury that the foregoing is ture and correct.

Executed on March 2nd, 1973, at HUNTINGTON BEACH, CALIFORNIA.

D. A. Standefer

Dean Standefer, 326½ Main Street, Huntington Beach, Ca.92648
(714) 536-7161

FILE COPY

Supreme Court, U.S.
FILED
JUN 27 1973
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

October Term, 1972

No. 72-1217

DALE C. RICHARDSON,

Petitioner,

vs.

COMMUNICATION WORKERS OF AMERICA, AFL-CIO, AND LOCAL 7495, COMMUNICATION WORKERS OF AMERICA, AFL-CIO,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR RESPONDENTS IN OPPOSITION

ROBERT E. O'CONNOR
1304 City National Bank Building
Omaha, Nebraska 68102

and

J. PATRICK GREEN
707 City National Bank Building
Omaha, Nebraska 68102

Counsel for Respondents

COCKLE PRINTING CO., 1822 St. Mary's Ave., Omaha

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Argument:

Richardson is attempting an appeal from an order granting a new trial. The Court of Appeals has no jurisdiction over such an appeal. It properly dismissed the appeal. 7

A. The grant of a motion for new trial on a claim five years after filing of suit, where that claim was first recognized in an appeal in the same case seven months before the grant, and the first trial of the claim was five months before the grant, does not deny a plaintiff due process. 9

B. The District Court acted within its jurisdiction when it granted the new trial. The new trial was granted for reasons stated in the motion for new trial filed by the two Unions. In any event, compliance with Rule 59(d) is not jurisdictional. 14

C. The Court of Appeals properly held that no final order had been entered on the first cause of action. In any event, even if the Unions' appeal on the first cause of action

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was properly taken, that would not make the order granting the new trial on the second cause of action appealable. 21

D. The Court of Appeals had power to dispose of Richardson's appeal without oral argument. 24

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IN THE

Supreme Court of the United States

October Term, 1972

No. 72-1217

DALE C. RICHARDSON,

Petitioner,

vs.

COMMUNICATION WORKERS OF AMERICA, AFL-CIO, AND LOCAL 7495, COMMUNICATION WORKERS OF AMERICA, AFL-CIO,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The relevant opinions in the courts below are referred to in the petition at page 2, and are set forth in appendices to the petition.

JURISDICTION

The jurisdictional requisites are adequately set forth in the petition.

QUESTIONS PRESENTED

1. Does the grant of a motion for new trial on a claim five years after the initial filing of a suit, where the claim was first recognized in the appeal in the same case seven months before the grant and the first trial of the claim was five months before the grant, deny the plaintiff due process of law?

2. Where a motion in the alternative for remittitur, judgment notwithstanding the verdict, and new trial assigns as one of the grounds for relief the excessiveness of the verdict, and the trial court grants a new trial because the verdict was excessive "as a result of passion, prejudice, mistake or some other improper reason", has the trial court granted the motion for new trial on a grounds not stated in the motion so as to require compliance with Rule 59(d) of the Federal Rules of Civil Procedure?

3. Where the trial court grants a motion for new trial for a reason other than stated in the moving party's motion, is compliance with Rule 59(d) a jurisdictional prerequisite to the valid entry of such order?

4. In a multiple claim case is the absence of "an express determination that there is no just reason for delay" prior to the entry of judgment fatal to the jurisdiction of the Court of Appeals under 28 U. S. C. § 1291 because the absence of such certificate renders the judgment nonfinal?

5. May a Court of Appeals consistently with the Federal Rules of Appellate Procedure adopt a practice

whereby it screens appeals in advance of the time of oral argument and does not allow oral argument in those cases in which the Court believes that oral argument would not be an aid to the ultimate determination of the appeal?

STATEMENT

This case involves a suit by a former employee against his employer, the Western Electric Company, which has now settled out of the case, and the bargaining agent of the employees of Western Electric, the Communication Workers of America and Local 7495 of the Communication Workers of America, the Local at the Western Electric works in Omaha at which Richardson had been employed prior to his discharge. The suit is brought pursuant to § 301 of the Labor Management Relations Act, 29 U. S. C. § 185.

The suit was originally filed on December 21, 1966. In his original complaint Richardson sued for breach of contract. He included in his complaint for breach of contract allegations with regard to the infliction of mental distress upon him. Because the suit was for breach of contract, the trial court applied the ordinary contract rule that in an employee's suit for breach of contract damages are measured by the term of the contract, 11 Williston, Contracts 3rd, § 1358, p. 301; *Sullivan v. David City Bank*, 181 Neb. 395, 148 N. W. 2d 844, 846 (1967). Since federal jurisdiction was bottomed on the claim for breach of contract, and since the ordinary rule

is that damages for mental anguish are not allowed in contract, 11 Williston, op sit. § 1341, p. 214; Dobbs, Remedies, § 12.4, p. 819, the trial court treated the claim for mental anguish as a pendant state law claim and exercised his jurisdiction to dismiss it so that it could be filed in state court. Richardson took no action to assert in the state courts of Nebraska, a common law tort claim. Rather, he awaited the judgment which he eventually obtained in the District Court on the contract cause of action, and then appealed alleging that the judgment was insufficient.

At the first trial, the jury found that the Unions would not have fairly represented Richardson in a grievance procedure after he was terminated had he requested them to do so, that the two Unions had violated the contract provision against discrimination against non-Union members, that Richardson's discharge from his employment at Western Electric was wrongful, and that the discharge was proximately caused by the actions of both the International and the Local Union. The jury awarded Richardson damages of $20,000, which were eventually limited by the trial court to $1,500 because of the expiration date of the collective bargaining agreement.

Judgment was entered for Richardson on April 15, 1970, and he appealed to the Court of Appeals. Even in the Court of Appeals, Richardson still continued to argue that the damages for mental anguish were properly recoverable as part of an action for breach of contract.

On appeal, the Eighth Circuit rejected the limitation of damages for wrongful discharge to the period of the collective bargaining agreement. It held that seniority

was a contract right which survived the term of the contract. In so holding, the Court followed the now overruled Second Circuit decision in *Zdanok v. Glidden Company*, 288 F. 2d 99 (2nd Cir. 1971), affirmed on other grounds, 370 U. S. 530 (1962); see *Local 1251 UAW v. Robert Shaw Controls Company*, 405 F. 2d 29 (2nd Cir. 1968) (en banc). With regard to the claim for damages for mental anguish, the Court noted that Richardson had erred in treating his claim against the Unions as a claim for breach of contract. The Court categorized the claim as analogous to a claim for breach of fiduciary duty, and held that damages for mental anguish could be allowed by analogy to the parasitic recovery of damages for mental anguish in intentional tort cases, see Prosser, Torts 4th, p. 52, even though such damages are not generally recoverable in cases involving economic torts, *Harsh v. Czyz*, 157 Neb. 699, 61 N. W. 2d 265, 272 (1953). On the claim for damages for lost employment, the Court of Appeals treated the liability of Western Electric and each Union as established and limited the retrial to the issue to the amount of damages and their appropriate allocation among the parties. In addition, the Court authorized Richardson to file a second claim against the Unions for mental distress. *Richardson v. Communication Workers of America*, 443 F. 2d 974 (8th Cir. 1971).

The Court of Appeals reversed the District Court on June 4, 1971. Richardson filed an amended complaint. The complaint stated two claims. The first claim against both the employer and the Unions for wrongful discharge, and the second claim against only the Unions for mental anguish. The trial commenced in early September and

the jury returned its verdict on September 16th. The case was submitted to the jury on special interrogatories, and it found for Richardson on both claims. On the first claim it awarded Richardson $92,000 in damages apportioned thirty percent to Western Electric and seventy percent to the two Unions. Upon Richardson's second claim, the jury awarded him $250,000. Because the verdict was on special interrogatories, entry of judgment did not follow as of course under Rule 58 of the Federal Rules of Civil Procedure.

On October 8, 1971, prior to the entry of any judgment, the Unions moved for remittitur, judgment notwithstanding the verdict or in the alternative for new trial. The trial court heard oral argument on the Unions' motion for new trial in November of 1971. The motion for new trial was ruled on on February 29, 1972, after a grant to Richardson of additional time to file a memorandum brief on the motion for new trial. The Unions were denied a new trial as to Richardson's first claim, but a new trial was granted as to the second claim. The trial court ended its opinion on the motions for new trial with the direction that "a judgment will be entered". In conformity with this direction, the Clerk entered a judgment.

The two Unions took an appeal from the judgment on the first claim. Richardson appealed from the grant of the new trial. The Court of Appeals for the Eighth Circuit dismissed the appeal of the two Unions because the order from which they appealed was not yet final, since it was a judgment on a single claim in a multiple claim action, and the certificate of no just reason for delay required by Rule 54(b) of the Federal Rules of

Civil Procedure had not been made. The Court of Appeals dismissed Richardson's appeal because it was an appeal from an order granting a new trial, which is a non-final order. *Richardson v. Communication Workers of America*, 469 F. 2d 333 (8th Cir. 1972).

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ARGUMENT

Richardson is attempting an appeal from an order granting a new trial. The Court of Appeals has no jurisdiction over such an appeal. It properly dismissed the appeal.

This is an appeal from an order granting a new trial. Under § 1291 of Title 28 U. S. C., the Court of Appeals has jurisdiction only over an appeal from a "final" order. "A 'final decision' generally is one which ends the litigation on the merits and leaves nothing for the court to do but execute the judgment." *Catlin v. United States*, 324 U. S. 229, 233 (1945). The grant of a motion for new trial does not terminate the litigation. Rather, the "granting a new trial, in the exercise of an acknowledged jurisdiction, leaves no judgment in force to be reviewed." *Phillips v. Negley*, 117 U. S. 665, 671 (1886). Since the grant of a new trial does not terminate the litigation, but rather eliminates the judgment, the grant of a new trial is not a final order and is not appealable when made, *Cincinnati Street Railway Company v. Snell*, 179 U. S. 395, 397 (1900); *Laclede Gas Light Company v. Public Service Commission of Missouri*, 304 U. S. 398 (1938).

Because this was an appeal from an order granting a new trial, the Eighth Circuit properly held that:

> "After full consideration the court finds that it lacks jurisdiction to review the matters before it. It has long been settled that the granting of a new trial is not an appealable order. 6A Moore, Federal Practice & Procedure, § 59.9(4) at 3853-3854 (1971). The granting of the new trial may be challenged on abuse of discretion in an appeal only from the final judgment. See Gallon v. Lloyd-Thomas Company, 261 F. 2d 26, 27-28 (8th Cir. 1958)." 469 F. 2d 334.

Richardson attempts to escape the rule that a grant of a new motion for new trial is not an appealable order on three alternative grounds. First, Richardson attempts to invoke the exception to this rule recognized in *Phillips v. Negley,* supra, that where the trial court lacks jurisdiction to grant the new trial, the order granting the new trial is appealable. He argues (a) that the grant of the new trial was void since it amounted to a denial of due process, and (b) that the District Court was without jurisdiction since it failed to comply with Rule 59(d) of the Federal Rules of Civil Procedure. Alternatively, Richardson attempts to bring this case within the doctrine of *Cohn v. Beneficial Loan Corporation,* 337 U. S. 541 (1949). He argues (c) that the Court of Appeals has jurisdiction under Rule 54(b) of the Federal Rules of Civil Procedure to review the Unions' appeal from the judgment on the first cause of action, and that his appeal from the grant of the new trial on the second cause of action should be reviewed along with the judgment on the first cause of action. Finally, Richardson argues (d) that without regard to the merits of the decision of the

Eighth Circuit, the case should be remanded to the Eighth Circuit for the hearing of oral arguments, since Rule 6 of the Eighth Circuit under which oral argument was denied in this case is invalid as in conflict with Rule 34 of the Federal Rules of Appellate Procedure. We deal with these arguments in sequence, and demonstrate that none of them is correct.

A.

The grant of a motion for new trial on a claim five years after filing of suit, where that claim was first recognized in an appeal in the same case seven months before the grant, and the first trial of the claim was five months before the grant, does not deny a plaintiff due process.

Richardson contends, Petition for Certiorari No. 72-1217, pp. 8-11, that the grant of the motion for new trial in this case was a denial of due process. The jist of this argument is that because of the time that has elapsed in this case, Richardson is entitled to any jury verdict he received without regard to the ordinary right of a federal judge to grant a new trial for excessiveness of the verdict, and without regard to the ordinary right of the defendant to move for a new trial on the grounds that legal error has occurred. Under Richardson's view, the grant of the new trial was unconstitutional without regard to its merits.[1] In addition, if the full logic of the

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[1] The new trial, as we demonstrate infra, page 15, was granted on the grounds of excessiveness of the verdict. In a state where the high-

(Continued on following page)

argument is accepted, the Unions apparently would be debarred of any appeal in which they sought a new trial on the grounds advanced in their motion, but rejected by the District Court, since it is the grant of the new trial without regard to its merits which constitutes the denial of due process.[2]

Richardson cites no authority for this novel argument; nor do we know of any. While the course of these proceedings has been elongated, they have been tried under the ordinary rules applicable to civil litigation in

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(Continued from previous page)

est reported personal injury verdict, and probably one of the highest personal injury verdicts ever returned, is $325,000, **Kohler v. Ford Motor Company,** 187 Neb. 451, 191 N. W. 2d 600 (1971), it is not surprising that the trial judge regarded a $250,000 verdict for mental anguish unaccompanied by any physical injury as excessive.

2 The trial court instructed the jury upon the basis that the mere relationship of International Union and Local created an agency relationship as a matter of law. The federal courts have uniformly held that such a relationship does not exist as a matter of law, but rather, only exists when upon the application of ordinary agency principles, a finding of agency would otherwise be justified. **N. L. R. B. v. International Longshoremens Union,** 283 F. 2d 558 (9th Cir., 1960); **Barefoot v. International Brotherhood of Teamsters,** 424 F. 2d 1001 (10th Cir. 1970); **Harnischfeger Corporation v. Sheet Metal Workers International Association,** 436 F. 2d 351 (6th Cir. 1970). In addition to this error in the instructions, the trial court allowed Richardson's counsel to make a Golden Rule argument. The federal courts have uniformly held that the allowance of such an argument is prejudicial error, **F. W. Woolworth Company v. Wilson,** 74 F. 2d 439, 442 (5th Cir. 1934); **Chicago & Northwestern Railroad Company v. Kelly,** 84 F. 2d 569, 576 (8th Cir. 1936); **Klotz v. Sears, Roebuck & Company** 267 F. 2d 53 (7th Cir. 1969); **Johnson v. Colglazier,** 348 F. 2d 420 425 (5th Cir. 1965); **Shroyer v. Kaufman,** 426 F. 2d 1032, 1033-103 (7th Cir. 1970); see further **Anno: Argument-Taking Position of Litigant,** 70 ALR 2d 935. In their motion for new trial, the Unions argued that both of these legal errors would have justified the grant of a new trial.

federal courts. While the delay may have been long, it is not the product of a deliberate effort on the part of the federal judiciary to prevent Richardson from receiving any relief, see *Smith v. Illinois Bell Telephone Company*, 270 U. S. 587, 591-592 (1926). So long as motions for new trial and appellate review are provided for delay, and sometimes even inordinant delay, may occur. However, unless the jury at some point in time is to be vested with absolute and unfettered discretion, and unless errors at trial, however egregious become unreviewable, delays such as this will sometimes occur. Such delay with its attendant expense, while unfortunate, does not constitute a denial of due process. See *Myers v. Bethlehem Shipbuilding Corporation*, 303 U. S. 41, 51-52 (1938); *Younger v. Harris*, 401 U. S. 37, 46 (1971). "The expense and woe of litigation are risks to which whatever the modes of justice—and though one may win in the end—we are all subject." Jaffe, Judicial Control of Administrative Action, p. 428.

Richardson bottoms his due process argument on the position that the delay in this case is no wise a product of any action on his part. That view is a distortion of the record. The trial court entered judgment for Richardson in the first trial on April 15, 1970. The Court of Appeals reversed the District Court on June 4, 1971. Both the abortive character of the first trial, and the more than the year delay attendant on the appeal from the judgment in the first trial, were products, at least in part, of the initial pleading error which Richardson's counsel made when he filed his suit as a suit for breach of contract. Upon remand, the District Court commenced

the trial in early September of 1971 and verdict was returned by September 16th. The trial court heard oral argument on the Unions' motion for new trial in November of 1971. The motion for new trial was finally ruled on on February 29, 1972, after a grant to Richardson of additional time to file a memorandum brief on the motion for new trial. The delay from February 29, 1972 to date has been involved in Richardson's attempt to appeal from the grant of the motion for new trial. Thus, while this case has been delayed six years, the non-submission of the issue of damages for mental anguish to the jury in the first case was largely a product of a pleading error which Richardson's counsel made. In addition, more than two and one-half years of the delay has been consumed in appeals which Richardson has taken.

Unless the rule is that plaintiffs may appeal from any order which dissatisfies them, but defendants are debarred from seeking relief from verdicts and judgments, we fail to see a denial of due process to Richardson here. Moreover, the two basic reasons which Richardson gives for believing that delay is a denial of due process, the mounting expenses of litigation and the fading memories of witnesses, affect defendants at least as much as plaintiffs. Richardson's position is that the grant of new trial is void without regard to its merits as a denial of due process. We submit, that if expense and delay are to form the basis for a rule that litigation must be terminated, it would be equally logical to hold that if Richardson has not been able to obtain a jury verdict uninfected by error in seven years, the defendants are entitled to a dismissal on the grounds that the

delay is a denial of due process as to them. Since Richardson is not paying any of his own litigation expenses, Petition for Certiorari No. 72-1217, p. 8, and since the judgment for mental anguish is not designed to compensate Richardson for any sums which he is out-of-pocket and has already expended, it would seem that the burden of delay lays at least as heavily upon the Unions as it does upon Richardson.

Richardson makes no suggestion as to how a rule could be crafted which would sort out cases in which delay is a burden to the plaintiff and cases in which delay is a burden to the defendant. Nor does Richardson show how such a due process rule could be formed in favor of the plaintiff without impeding the rights of the defendant. The Due Process Clause of the Fifth Amendment is not a sufficiently refined tool to be utilized in formulating rules to expedite litigation in the federal courts.

In aid of his argument Richardson cites language from *County of Allegheny v. Frank Mashuda Co.*, 360 U. S. 185, 196 (1959), that speaks of "that promptness of decision which in all judicial actions is one of the elements of justice." One of the purposes of the final judgment rule "is elimination of delay caused by interlocutory appeals." *Catlin v. United States*, supra, 324 U. S. 234. This case demonstrates that in the main "promptness of decision" is best assured by not reviewing interlocutory orders. The year and a half consumed by Richardson's appeal from the grant of the new trial would have been an ample period of time within which to retry the second claim and to take an appeal to the Eighth

Circuit. Richardson's efforts to appeal from a patently nonappealable order have had no other effect than to deny him the prompt justice, which he seeks. The decision of the Court of Appeals should be affirmed, so that the second claim may be retried.[3]

B.

The District Court acted within its jurisdiction when it granted the new trial. The new trial was granted for reasons stated in the motion for new trial filed by the two Unions. In any event, compliance with Rule 59(d) is not jurisdictional.

In his petition for certiorari, Richardson argues that the grant of a new trial is reviewable here because the District Court proceeded in excess of its jurisdiction, Petition for Certiorari No. 72-1217, pp. 11-17. The prem-

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3 Richardson claims that the grant of the new trial here is a product of the trial judge's antipathy to claims for mental anguish and that unless the grant of the new trial is reviewed now the trial judge will never allow a judgment for damages for mental anguish to become final. Both of these arguments are far fetched. The trial judge has demonstrated no antipathy to damages for mental anguish. He refused to allow the issue of mental anguish to go to the jury in the first trial because Richardson had sued for breach of contract, and damages for mental anguish are not generally allowed in contract actions, 11 Williston, Contracts 3rd, § 1341, p. 214; Dobbs, Remedies, § 12.4, p. 819. When the jury returned its verdict on the second cause of action in the second trial, the trial judge set that award aside, not because he believed that no damages were warranted, but because he believed that an award of $250,000 was excessive. In any event, should the trial court abuse its power to grant new trials and persistently deny Richardson judgment in the face of a second substantial jury award for mental anguish, Richardson has adequate protection against such an abuse of judicial discretion, see 28 U. S. C. § 1651; 6A Moore, Federal Practice, § 59.15(2), pp. 3898-3901; Wright, Federal Courts 2d § 95, p. 421.

ises for this argument is that the District Court did not comply with Rule 59(d) of the Federal Rules of Civil Procedure. The noncompliance is alleged to be a failure to specify the grounds for the grant of the new trial and a failure to hold a hearing prior to the grant of the new trial. Rule 59(d) only applies when the District Court grants a new trial on its own motion or when the District Court grants a new trial for a reason not stated in a moving party's motion. Here the motion for new trial was granted on grounds stated in the moving parties' motion. In any event, compliance with Rule 59(d) is not jurisdictional.

The Unions made a motion for new trial on October 8, 1971. Among the specifications in the two Unions' motion for new trial were the following:

> "II. The damages awarded by the jury were so excessive as to clearly establish they resulted from factors not admitted in evidence. . . . XI. That the damages allowed by the jury in both causes of action were not sustained by the evidence and are contrary to the charge of the court as to the measure thereof. . . . XIII. That as to the verdict on the second cause of action, the amount of damages awarded was punitive, exemplary and excessive. That the plaintiff's counsel was permitted to argue exemplary damages even though the instruction of the court stated that punitive and exemplary damages would not be permitted in the jury's verdict."

In his opinion granting the motion for new trial on the second cause of action, the District Judge stated:

> ". . . The subject of mental suffering is by necessity an abstract subject and it cannot be expected that damages can be computed with mathematical

> certainty, and the court would not interfere if it were not of the firm opinion that the jury disregarded the evidence or the rules of law and rendered its verdict as a result of passion, prejudice, mistake or some other improper reason. . . ."

Later in the opinion, the trial judge added that:

> ". . . It is clear that the verdict was excessive and intended to punish the defendant or resulted from some other improper reason. Yet the court does not view the facts such that it would be proper to sustain a motion for remittitur because there is no way to effectively separate the proper elements of damages from those attributed to improper reasons. Thus a new trial on the issue of mental distress, anguish or humiliation will be ordered."

The motion for new trial filed by the Unions was bottomed on the premise that the damages awarded on the second cause of action were well beyond any award that would have been proper to compensate Richardson for mental anguish. The trial court agreed with this position and sustained the motion. The argument that the trial court granted the motion "for a reason not stated in the motion" so that the requirement of "notice and opportunity to be heard" on this new ground would attach under Rule 59(d) is erroneous. The grounds of the grant were contained in the Unions' motion for new trial upon which the plaintiff had already been heard. No new specifications of grounds or new hearing was required from the trial court.

Richardson attempts to differentiate the grounds upon which the trial court based its decision from those in the motion because the trial court used the phrase

"passion, prejudice" in its opinion.[4] However, this phrase appears as the first in a list of possible reasons for the excessiveness of the verdict. A fair reading of the trial court's memorandum demonstrates that a new trial was ordered because the verdict was excessive. On these facts, the counsel of the Advisory Committee at the time at which it proposed the language in Rule 59(d) involved here should be controlling:

> "In considering whether a given ground has or has not been advanced in the motion made by the party, it should be borne in mind that the particularity called for in stating the grounds for a new trial motion is the same as the requirement for all motions by Rule 7(b) (1). The latter rule does not require ritualistic detail but rather a fair indication to court and counsel of the substance of the grounds relied on."

The motion made by the Unions gave the counsel for Richardson "a fair indication . . . of the substance of the

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[4] Richardson makes much of a supposed division of authority as to whether or not passion or prejudice may be inferred from the size of the verdict alone, Petition for Certiorari No. 72-1217, pp. 13-15. However, even if this conflict exists, it is irrelevant here. The conflict, as the authorities cited by Richardson demonstrate, is a conflict with regard to the standards which a Court of Appeals should apply in reviewing a trial court's denial of a motion for new trial, where it is claimed that the denial was an abuse of discretion because the verdict was excessive, see 6A Moore, Federal Practice, § 59.08(6) pp. 3829-3830; 3 Barron & Holtzoff, Federal Practice and Procedure (Wright Ed.), § 1302.1, pp. 348-350. It has nothing to do with the right of the District Court to grant a motion for new trial, which he may do without regard to the presence or absence of passion or prejudice, whenever he believes that the verdict is excessive, see Wright, Federal Courts 2d, § 95 p. 420.

grounds relied on." The trial court acted upon those grounds.[5]

Even if the District Court failed to comply with Rule 59(d), noncompliance with that rule is not a jurisdictional defect. Rule 59(d) was amended in 1966 in order to overturn a line of cases such as *Fried v. McGrath*, 133 F. 2d 350 (D. C. Cir. 1942), which had held that the grant of a new trial more than ten days after judgment, even though one of the parties had moved for

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5 Richardson attaches such significance to the words "passion, prejudice" because he believes that remittitur or partial new trial was denied because of a finding of passion or prejudice, Petition for Certiorari No. 72-1217, p. 16. It is true that a remittitur or partial new trial limited to the issue of damages cannot be granted where a verdict is set aside on the grounds that it was a product of passion or prejudice, **Minneapolis, St. Paul and Saulte Ste. M. Railway Company v. Moquin**, 283 U. S. 529 (1931). However, the trial judge did not find the verdict was the product of passion or prejudice, but only that it was excessive. He denied a remittitur because the verdict was so large the proper award could not be severed from the improper parts of the award. Nor, while the trial court does not specifically discuss the issue, would a partial new trial limited to the issue of damages have been possible here. The issue of liability and the issue of damages are inextricably interwoven on Richardson's second cause of action. His claim for mental anguish involved a course of conduct by a large number of individuals over a seven month period. In determining the amount of Richardson's damages, it was necessary for the jury to determine as to each particular act of harrassment whether either the Local or the International was liable for it under the principle of respondeat superior. While the jury in the second trial made a general finding of liability for mental anguish, that finding would be of no aid to a jury in a second trial, since it would still be necessary to separately determine liability as to the individual acts before allowing damages for the anguish which they may have caused. In these circumstances, a partial new trial limited to the issue of damages would have been improper, **Gasoline Products Company v. Champlin Refining Company**, 283 U. S. 494, 500-501 (1931).

a new trial, was void if granted for a reason not stated in the pending motion.

> "The cases by their rigidity had become merely an obstacle to just decision; the beam surely tipped in favor of some remedy." Kaplan, Continuing Work of the Civil Committee: 1966 Amendments to the Federal Rules of Civil Procedure (II), 81 Harvard Law Review, 598, 693.

The remedy adopted was to allow the trial court, if a timely motion was filed, to grant a new trial for reasons not stated in the motion beyond the ten days in which the court might otherwise act upon its own motion. Kaplan, op sit., 81 Harvard Law Review 604.

With this background, it would be strange to hold that the rule had removed one jurisdictional rigidity only to supplant it with another. But Richardson argues that the notice and hearing provided for in Rule 59(d) should be treated as jurisdictional. To so hold would merely insert a new obstacle to just adjudication in the place of another. As Kaplan argues:

> ". . . The final text adds the point that before the court grants a motion for a reason not stated therein, it should give the parties notice and a chance to be heard It is not clear to me why this should appear uniquely in a rule on the new trial motion: if the idea of notifying the parties before doing something on a basis previously undiscussed or undisclosed is sound here, why should it not apply to the determination of all other motions, or other important motions? It has hitherto been left to the judges common sense and feeling for the particular situation. The provision should, I think be read as directive but not as conditioning effective action by

the judge; it will then be harmless and then perhaps marginally helpful." Kaplan, op sit., 81 Harvard Law Review, 604; cf. *Cherokee Laboratories, Inc. v. Pearson,* 415 F. 2d 85, 91 (10th Cir., 1969).

Richardson argues that the trial court's order granting the motion for new trial is reviewable for abuse of discretion, Petition for Certiorari No. 72-1217, pp. 17-18. We have no quarrel with this proposition. At the proper time, after a final judgment upon the second cause of action, the trial court's decision to grant a new trial is reviewable. If a second trial should produce a result less favorable to Richardson than the result he obtained on the first trial, he may, upon appeal, assert that the grant of a new trial was legally erroneous and seek the fruits of the jury verdict he obtained on the first trial. 3 Barron & Holtzoff, Federal Practice and Procedure (Wright Ed.), § 1302.1, pp. 346-347; *Altrichter v. Shell Oil Company,* 263 F. 2d 377, 379 (8th Cir. 1959). However, review must await the final judgment.[6]

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6 Richardson does not demonstrate the trial court abused its discretion. The trial judge may grant a motion for new trial whenever "the judge on the entire evidence is left with a definite and firm conviction that a mistake has been committed. . ." Wright, Federal Courts 2d, § 95, p. 420. In this case the trial judge was left with a definite and firm conviction that a mistake had been made. The sole question for a reviewing court is whether or not the trial judge abused his discretion in reaching that conviction and acting upon it. **Perry v. Bertsch,** 441 F. 2d 939, 943 (8th Cir. 1971). Abuse of discretion cannot be found here.

The verdict here is for $250,000. The course of conduct involved allegedly began in February and terminated in September, a period of seven months. It consisted in the main of the use of vile.

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C.

The Court of Appeals properly held that no final order had been entered on the first cause of action. In any event, even if the Unions' appeal on the first cause of action was properly taken, that would not make the order granting the new trial on the second cause of action appealable.

In the same order in which he granted a new trial on the second claim, the trial judge overruled the motion of the Unions for new trial on the first claim. He ended his opinion with a direction that "a judgment will be

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derrogatory epithets, either verbally to Richardson or posted upon signs around his place of work. On several occasions, Richardson's car was blocked on the company parking lot. The physical violence against Richardson consisted of throwing nuts and bolts and screws at him. In addition Richardson was involved in three fights. In the first fight with a man named Reeber, he threw the only punches. In a second incident at a water fountain, he pushed the other man. In the third fight, he was kicked. See, **Richardson v. Communication Workers of America,** 443 F. 2d 974, fn. 12 (8th Cir. 1971).

Richardson suffered no permanent physical injury as a result of these events. He suffered no temporary physical discomfort, which can unambiguously be related to these events. His only damage was mental anguish. The conduct occurred intermittently over seven months at work. The jury verdict of $250,000 for this mental anguish amounted to an award of approximately $35,715 per month for the anguish. Assuming twenty working days in a month, this amounted to an award of $1,785 per day for this anguish. Since the events took place at work and the work day is eight hours, this is an award of $223 an hour for mental anguish. The award of $223 an hour to Richardson for the discomfort involved in being insulted, hearing obscene epithets, and being in three fights is simply too large, or at least the trial judge could reasonably believe that it was too large, which is all that is required to prevent the order from being an abuse of discretion.

entered." In conformity with this direction, the Clerk entered a judgment. The two Unions took an appeal from this judgment. In the same opinion in which it dismissed Richardson's appeal, the Eighth Circuit also dismissed the Unions' appeal because the trial court had not made "an express determination that there is no just reason for delay" and directed the entry of judgment, as is required to finalize a judgment on a single claim in a multiple claim case under Rule 54(b) of the Federal Rules of Civil Procedure, *Richardson v. Communication Workers of America,* supra, 469 F. 2d 334-335. In dismissing the appeal for want of the express finding, the Court of Appeals followed the uniform holding that of the Courts of Appeals that the certificate is a prerequisite to appeal, since without it the judgment is not final. 6 Moore, Federal Practice, § 54.28(2), pp. 367-376, see especially p. 373 and authorities gathered fn. 37.[7]

In any event, even if the Court of Appeals had jurisdiction over the Unions' prior appeal from the judgment on the first cause of action, this would not affect the appealability of the order granting the new trial. The function of Rule 54(b) is to allow the district judge to im-

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7 After the Court of Appeals' decision, but prior to disposition of Richardson's motion for rehearing en banc, on December 4, 1972, the trial court made the requisite certificate and judgment was entered. The Unions then filed a new notice of appeal and perfected an appeal to the Eighth Circuit. The trial court had full authority to make the Rule 54(b) certification despite the pendency of the motion for rehearing en banc, **United States v. Crescent Amusement Company,** 323 U. S. 173, 177-178 (1944); **Ruby v. Secretary of the Navy,** 365 F. 2d 385, 389 (9th Cir. 1966). The new appeal is now being held by the Eighth Circuit pending a determination of Richardson's petition for certiorari.

part finality to an order disposing of one total judicial unit of a multiple unit case, see, 6 Moore, Federal Practice, § 54.27(2.2), pp. 325-329. In any Rule 54(b) situation, when the order final because of certification comes on to be heard in the Court of Appeals, there will be other orders of the district court which remain unappealable. If the argument for which Richardson opts is adopted, the effect of a Rule 54(b) certification would no longer be to make the single unit of the multiple unit case appealable, but would rather make the total case appealable in direct contravention of the central purpose of the rule.

Neither *Gillespie v. United States Steel Corporation*, 379 U. S. 148 (1964), nor *Green v. Wolf Corporation*, 406 F. 2d 291 (2nd Cir. 1968), cert. denied, 395 U. S. 977 (1969), upon which Richardson principally relies for his argument that if the Court of Appeals had jurisdiction over the appeal on the first claim it also had jurisdiction of the appeal from the order granting the new trial on the second claim, supports that argument. In *Gillespie*, the Court noted that the issues raised were at least arguably severable from the main case so as to come within the collateral issue doctrine, 379 U. S. 153-154. Since the issues raised were at least arguably collateral, the Court followed the lead of the Court of Appeals in declining to decide the close issue of finality, and in treating the order as final. See 9 Moore, Federal Practice, § 111.12, pp. 150-152. However, here no close question of finality is present. An order sustaining a motion for new trial is clearly nonappealable. Nor is such an order in any sense collateral to the main case. There is simply

no way of torturing this case into the collateral issue do trine of *Cohn v. Beneficial Industrial Loan Corporatio* 337 U. S. 541 (1949).

Green v. Wolf Corporation is irrelevant. In th case the Court of Appeals had jurisdiction over an appe from an order striking those parts of plaintiff's co plaint which purported to make the suit a class actio The plaintiff also attempted to appeal from a portion the trial court's order striking his prayer for puniti damages. The Court of Appeals acknowledged that had no jurisdiction over the appeal from the order stri ing the prayer for punitive damages, 406 F. 2d 302. Ne ertheless, the Court went on to pass upon the merits that order. In so doing, the Court was acting contra to the usual judicial practice of confining an opinion the issues actually before the Court. However, the Cou justified this departure from practice by a simplificati of the trial that would follow in the court below, and t importance of guidance to a lower court on punitive da age issues Securities Act litigation. Richardson, howeve seeks not instructive dicta as in *Green v. Wolf Corpor tion,* but binding appellate review, an issue to whi *Green v. Wolf Corporation* does not speak.

D.

The Court of Appeals had power to dispose of Richardson's appeal without oral argument.

This appeal was disposed of without oral argume by the Eighth Circuit pursuant to its Rule 6. Richards argues that Rule 6 is invalid. The invalidity of Rule is alleged to lie in its conflict with Rule 34 of the Feder

Rules of Appellate Procedure. However, this argument overlooks the provision of Rule 2 of the Federal Rules of Appellate Procedure that:

> "In the interest of expediting decision, or for other good cause shown, a court of appeals may except as otherwise provided in Rule 26(b), suspend the requirements or provisions of any of these rules in a particular case on application of a party or on its own motion it may order proceedings in accordance with its direction."

The Fifth Circuit has held that this rule validates the type of pre-submission screening indulged in by the Eighth Circuit under its Rule 6, *Groendyke Transport, Inc. v. Davis,* 406 F. 2d 1158, 1161-1163 (5th Cir. 1969). This decision has been approved by the Reporter of the Advisory Committee on the appellate rules, Professor Bernard J. Ward, who states:

> "The decision is fully consistent with the spirit of Rule 2, and it is to be hoped that it will be generally followed. Rule 2 recognizes that there are times when the ordinary operation of the appellate rules will in fact impede the very purpose of the rules—the speedy, just and inexpensive determination of appeals. When this is so, Rule 2 authorizes the court of appeals to suspend the rules and to proceed as it thinks best." 9 Moore, Federal Practice, § 202.02(1), p. 603.[8]

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8 Judge Friendly informs us that "the courts of appeals already are in a state of crisis" because of the increase in the number of appeals filed in recent years, Friendly, Federal Jurisdiction: A General View, pp. 31-32. Six of the Circuits have seen pre-submission screening of appeals, and the disallowance of oral argument in certain cases,

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CONCLUSION

Richardson has attempted an appeal from a non final order. The Court of Appeals dismissed his appeal because it did not have jurisdiction, since the order was not final. Richardson has pointed to no valid reason for overturning the Court of Appeals' decision.

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as a partial answer to this crisis, see First Circuit Rule 6; Fourth Circuit Rule 7(a)(b); Fifth Circuit Rules 17, 18 and 20; Sixth Circuit Rules 3(e), 7(e), 8 and 9; Eighth Circuit Rules 6, 8 and 9; and Tenth Circuit Rules 8 and 9, and three additional circuits, without adopting a general screening process, have provided for dispensing with oral argument upon order of the court, Third Circuit Rule 12(6); Ninth Circuit Rule 3(a); D. C. Circuit Rule 11(e). While the expedition in fact imparted to the appellate process by this pre-sumission screening process may be debatable, compare Friendly, op sit., pp. 41-42; Edwards, The Avoidance of Appellate Delay, 52 F. R. D., 61, 63-65, the widespread adoption of this pre-submission screening practice indicates that many of the Circuits have found it a valuable aid in managing their dockets. If Rule 34 was designed to prevent the Courts of Appeals from adopting this useful practice, the bar would be in clearer language than that upon which Richardson founds his argument.